1985 CASE DIGEST INDEX

Editor's Note: The cases in the Index have been classified to conform to the Criminal Law Digest (third edition).

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PART I—STATE CRIMES

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.110 Family offenses

§ 3.120. —Child neglect

Oregon Defendant left her two children, aged 22 months and 8 years, alone to attend a Halloween party at a tavern several blocks away. She left home at around 9:30 P.M. Between 10:45 and 11 P.M. friends stopped at her house and observed the older child watching television. Defendant stayed at the tavern until 2 A.M. and had eight or nine beers during the evening. She returned to her house to find it filled with heavy smoke. Both children died from asphyxiation. Defendant was convicted by a district court of child neglect as defined in Section 163.545 of Oregon Revised Statutes. The court of appeals reversed because it found no substantial evidence to support the verdict.

The Oregon Supreme Court reversed and reinstated the verdict. Under the statute, a person "having custody or control of a child under 10 years of age commits the crime of child neglect if, with *criminal negligence*, he leaves the child unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child" (emphasis added).

There is both a physical element, leaving a child, and a mental state or culpability of the defendant, constituting the criminal negligence. For a defendant to be guilty of the crime of child neglect, there must be sufficient admissible evidence of both the physical and mental segments of the statute.

Moreover, the determination of criminal child neglect is based on a totality of the circumstances in respect to both the factual element of a child's being unattended, and to the culpability element. There is no such requirement as a "recognized or unrecognized dangerous condition in defendant's home" which the court of appeals thought necessary under the statute. Viewing the facts from a totality of the circumstances, there was sufficient evidence in this case for a jury to find the defendant guilty of child neglect. At a minimum, she left unattended her 22-month-old child and 8-year-old child, with no supervision, for a period of five hours on Halloween night in a home containing unlit matches and flammable materials. There was sufficient evidence for a jury to find defendant guilty. State v. Goff, 686 P.2d 1023 (1984), 21 CLB 187.

§ 3.200 Manslaughter

§ 3.210 —Malice, premeditation

Virginia Defendant was convicted of driving while under the influence of alcohol and three counts of second-degree murder for deaths resulting from injuries sustained in an automobile collision. On appeal, the question presented for determination was whether driving while under the influence of alcohol, resulting in the death of three persons, can supply the requisite element of implied malice to support a conviction of second-degree murder.

The majority of the Virginia Supreme Court held that under state common-law principles, malice is an element of all degrees of murder; malice, however, is not inferable from recklessnes. Under Virginia law, the presence of malice separates the offenses of murder and manslaughter. The court noted that the common theme running through definitions of malice is a requirement that a wrongful act be done willfully or purposefully, and this requirement of volitional action is inconsistent with inadvertence. Therefore, in Virginia, where the legislature has not seen fit to change the common-law distinctions between volitional and inadvertent conduct, a drunk driver who causes a fatal accident may be convicted of no more serious offense than manslaughter. The court majority adds that intoxication is not without relevance, however, because it is a factor used to determine a defendant's degree of negligence and, accordingly, the appropriate sentence to be imposed. Applying these principles, the majority found the evidence insufficient to support a finding of implied malice; therefore, the trial court erred in instructing the jury that it might find defendant guilty of second-degree murder. Essex v. Commonwealth, 322 S.E.2d 216, 21 CLB 380.

§ 3.353 Racketeering

Georgia Defendants were convicted of violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act based on predicate offenses of commercial gambling. Evidence was obtained pursuant to twelve surveillance (wiretap) warrants issued by a local judge upon application by the Fulton County district attorney. Defendants contended that the warrants were invalid because the Fulton County district attorney and judge were without authority to apply for and issue surveillance warrants as to telephones located outside Fulton County in seven neighboring counties, in furtherance of a multicounty gambling investigation centralized in Fulton County. To avoid detection of the tapes, the district attorney decided to use an "inductor coil" instead of "jumper wires" to tap into defendants' phone lines. The coils had to be installed in the terminal box close to the tapped phone. However, the conversations were then transmitted back to the investigators' Fulton County "listening post" where they were tape recorded.

The Georgia Supreme Court found that the federal Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 et seq., authorized issuance of these warrants by the Fulton County judge as well as the Georgia RICO Act. The court ruled that there was no jurisdiction problem here and emphasized the fact that the "listening post" was located in the county where the warrants were issued. The Georgia RICO Act looks to the physical placement of the "device" used for "overhearing, recording, intercepting, or transmitting sounds." Here the court concluded that the device was not the coil but the tape recorder. Thus, the district attorney and local judge were authorized to apply for and issue the warrants in question, and the trial court did not err in denying defendants' motions to suppress. Evans v. State, 314 S.E.2d 421 (1984), 21 CLB 83.

§ 3.355 Rape

Virginia Defendant was indicted for rape, and he moved to dismiss the indictment on the ground that pursuant to common-law principles, a husband cannot be convicted of raping his wife. The trial court rejected defendant's argument and denied the motion. The jury found defendant guilty of attempted rape, and he was sentenced to two years in prison. On appeal, defendant contended that the trial court erred in failing to dismiss the indictment.

The Virginia Supreme Court affirmed the conviction recognizing for the first time that under certain circumstances, a wife can unilaterally revoke her implied consent to marital sex, thereby making her husband criminally liable for any future attempts at intercourse. In arriving at this conclusion, the court majority rejected defendant's argument that Hale's rule, the so-called marital exemption found in English common law, bars a husband's conviction for rape or sexual assault. The majority also found that rule to be repugnant to recent state court decisions that recognized the independence of women, and that it does not comport with Virginia's no-fault divorce law.

Accordingly, the court held that a wife can unilaterally revoke her implied consent to marital sex where there was continuous separation by the wife from the husband for a substantial period of time, no sexual intercourse during the period, and additional objective evidence supporting an intention by the wife permanently to separate from the husband. Weishaupt v. Commonwealth, 315 S.E.2d 847 (1984), 21 CLB 81.

Virginia Defendant was convicted of marital rape. The couple was married on June 20, 1981. One child was born of the marriage, a son. In September 1982, the couple began to experience marital difficulties, and did not engage in voluntary sexual relations from September 1982 through the attack that occurred in March 1983, a period of six months. The husband moved out of the marital abode in mid-February, 1983. From that time there was neither sexual nor social contact between the parties. At the time the husband moved out, the parties discussed obtaining a legal separation. They once started on their way to visit a lawyer to institute divorce proceedings, but the wife decided to postpone the visit to the lawyer. Prior to the attack, the husband filed suit to secure custody of the child. Finally, about three weeks before the alleged offense, the husband, a naval enlisted man, began living aboard ship in port. Earlier, the Virginia Supreme Court ruled, in Weishaupt v.

Commonwealth, 315 S.E.2d 847 (1984) (21 CLB 81), that a husband could be prosecuted for raping his wife if, prior to the incident, the wife had conducted herself "in a manner that establishes a de facto end to the marriage." On appeal, the question presented was whether, under the evidence, the Commonwealth established beyond a reasonable doubt the elements necessary to sustain a conviction for marital rape.

The majority of the high court this time held that the wife's marital conduct during the six-month period before the assault was "equivocal, ambivalent, and ambiguous." Evaluating the foregoing circumstances, the court thought that the wife subjectively considered the marriage fractured beyond repair when the parties separated in February. However, this subjective intent was not manifested objectively to the husband, in view of the wife's vacillating conduct, so that he perceived, or reasonably should have perceived, that the marriage had actually ended. Kizer v. Commonwealth, 321 S.E.2d 291 (1984), 21 CLB 261.

4. CAPACITY

§ 4.10 Insanity—substantive tests

§ 4.20 —Burden of proof

Montana Defendant was convicted of attempted deliberate homicide and aggravated assault. Defendant's defense at trial was that he lacked the requisite criminal mental state by reason of his insanity. On appeal, his primary contention was that the Montana statutory scheme deprived him of a constitutional right to raise insanity as an independent defense. Montana did away with the affirmative defense of insanity in 1979 and enacted alternative procedures that allow for consideration of a defendant's mental condition. The 1979 law provides that evidence of a defendant's mental disease or defect be considered at three stages of the proceedings. A defendant's condition is to be (1) weighed prior to trial to determine the defendant's competence to be tried, (2) considered by the jury at trial to ascertain whether the state-of-mind element of the crime is met, and (3) scrutinized by the judge at sentencing in deciding whether, at the time of the crime, the defendant was able to appreciate the criminality of his acts or to conform his conduct to the law. If the answer to either of these questions is no, the judge is then required to institutionalize the defendant for a period not to exceed the maximum prison sentence that could be imposed for the crime. The prosecution still retains under the statute its traditional burden of proving all the elements of the crime beyond a reasonable doubt.

A majority of the Montana Supreme Court found that the statute leaves enough room for consideration of mental condition to satisfy the demands of due process under the Fourteenth Amendment, and rejects defendant's argument for a fundamental right to plead insanity. The statute does not unconstitutionally shift the state's burden of proof on the necessary elements of the offense. The state retains its traditional burden of proving all elements beyond a reasonable doubt. Turning to the Eighth Amendment, the court stressed the sentencing judge's duty under the statute to consider the convicted defendant's conduct at the time of the crime, and to order institutionalization on a finding that defendant suffered from a mental disease or defect. The court concluded that these requirements serve to prevent the imposition of cruel or unusual punishment upon the insane. State v. Korell, 690 P.2d 992 (1984), 21 CLB 376.

§ 4.40 —Committal and recommittal proceedings

New Hampshire In 1973, defendant entered a plea of not guilty by reason of insanity to a charge of murder in connection with the killing of his mother. The court accepted the plea and defendant was subsequently committed to the state hospital for life until or unless earlier release by due course of law. Under the law then in effect, defendant was not guaranteed the right to periodic review of his commitment. Later changes in statutory and case law, however, gave him that right, and he was recommitted in 1977, 1979, and 1981. In 1982, the legislature amended the recommittal statute providing for a judicial hearing for recommittal. At the hearing, when the court is satisfied by proof beyond a reasonable doubt that the hospital patient suffers from a mental disorder and that it would be dangerous for him to go at large, the court is obliged to renew the order of committal. The court is required

to find the hospital patient dangerous if his crime caused death or serious bodily injury and his mental condition is substantially unchanged. At the hearing, the court found it would be dangerous for defendant to go at large only by applying the 1982 statutory amendment to this matter, and accordingly ordered defendant recommitted subject to the continuation of his parole.

The New Hampshire Supreme Court reversed and remanded by holding that the irrebuttable presumption of dangerousness, based on defendant's past dangerous act and on the fact that the mental condition that led to his acquittal by reason of insanity had not substantially changed, offended the state constitution's due process clause. The court stated that due process requires that the patient be given a chance to defeat the statutory presumption with additional evidence. By denying the patient that chance, the 1982 amendment subverts the patient's right to confront the state on the issue of dangerousness and invites serious questions about punitive intent on the part of the legislature. State v. Robb, 484 A.2d 1130 (1984), 21 CLB 472.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

7. JURISDICTION AND VENUE

§ 7.05 Venue

Mississippi Defendant was extradited to Mississippi in connection with the killing of his stepfather. He filed a motion for change of venue, and after a hearing the motion was denied. After conviction for capital murder, defendant appealed on several claims of error. One of them was the court's denial of his attorney's request for a reasonable amount by way of expenses in order to conduct an investigation into the mood and attitude of the community toward defendant in furtherance of his motion for change of venue.

The Mississippi Supreme Court affirmed the denial of such expenses. The Mississippi statute allows for reimbursement to an indigent's appointed counsel for "reasonable expenses" but does not define those expenses. Whether to allow expenses for obtaining an expert is not a question of due process entitlement; it must be decided on a case-by-case basis, and has generally been denied. In this case, the purpose of the request for expenses to hire an investigator was to show the disposition of the community which ultimately was shown by other means. However, appellant's attorneys failed to outline any specific cost for the investigation. Applying the case-by-case approach it had first applied in a 1979 decision, the court held the denial of reasonable expenses to conduct the investigation was not error. Billiot v. State, 454 So. 2d 445 (1984), 21 CLB 186.

13. EVIDENCE

§ 13.02 View of crime scene

Virginia Defendant was convicted without a jury trial of possessing heroin with intent to distribute. Defendant was arrested as a result of a surveillance conducted by police officers in a certain block in the city of Richmond. At trial, defendant denied he was present where the officers testified they had seen him, and he denied possessing or selling heroin. Defense counsel's motion for a view was granted. The judge accompanied by the prosecutor and defense counsel viewed the scene of the crime. On his return to the court, the trial judge stated that defendant was asked to be there but waived his right to be present. Neither defendant nor his counsel made any comment following this statement. On appeal, defendant argued that a view of the scene of a crime is part of a felony trial, and that he had a right pursuant to the Virginia code to be present when the trial judge viewed the scene. Defendant contended that this is a right that cannot be waived, and therefore his absence from the view rendered his conviction invalid.

The Virginia Supreme Court affirmed his conviction and held that the right of an accused to be present at a view may be waived and the presence of the accused is not a jurisdictional prerequisite. The court added that even though an accused may waive his right to attend a view, the event must be conducted in a manner free from any prejudice to his right to a fair

trial; therefore, no evidence should be taken and no tests conducted in his absence. Neither should there be permitted any irregularity or misconduct that might tend to influence the trier of fact. Jones v. Commonwealth, 317 S.E.2d 482 (1984), 21 CLB 188.

ADMISSIBILITY AND WITNESSES

§ 13.110 Stipulations as evidence

Massachusetts Defendant was convicted of assault and battery by means of a dangerous weapon. The appellate court affirmed, and defendant appealed solely on whether his Sixth Amendment right to counsel was violated by the admission in evidence of a pretrial corporeal identification made by a witness in the presence of and at the request of a police officer and without notice to counsel. Pablo Jaime, a witness to the crime, identified the defendant at trial and also testified that he had previously done so. On May 2, 1980, the day of the defendant's probable cause hearing, defendant was seated in a courtroom waiting for the session to begin. Jaime had been summoned to the probable cause hearing and was also in the courtroom. Without advising defendant's counsel, the investigating police officer asked Jaime to step outside and, when he did, the officer asked Jaime if he had seen the assailant in the courtroom. Jaime said he had, and, at the officer's request, reentered the courtroom and pointed out defendant among spectators.

The Massachusetts Supreme Judicial Court reversed because of failure to exclude the identification. The court distinguished this case from cases involving evidence of identifications made at the time of probable cause hearings. Such cases require attention to the circumstances of any identification, the fairness or unfairness of the procedures followed, and the extent to which counsel undertook or could have undertaken to eliminate the suggestiveness of any identification.

Here, however, the adequacy of the defendant's right to counsel under the Sixth Amendment was the issue. The court was concerned with a rule that requires the per se exclusion of evidence of a pretrial, corporeal identification made at the request of and in the presence of a police officer without notice to counsel. Even if the identification procedures are fair and without prejudice to the accused, and even if counsel has been appointed, evidence of such an identification must be excluded.

These principles were extended to government-requested identifications made in the course of pretrial court proceedings in the absence of counsel or without notice to counsel. The exclusion is per se rather than on the basis of unfairness because the lack of notice to counsel leaves the defendant with no opportunity to prevent or control such a "showup" or to arrange alternatively for a lineup prior to the hearing. Commonwealth v. Donovan, 467 N.E.2d 198 (1984), 21 CLB 185.

§ 13.156 Evidence obtained under hypnosis

Idaho Two girls disappeared from their California home after their mother was murdered. The girls and the murdered mother's first husband were sighted in Boise and were identified from a newspaper picture. Further investigation produced witnesses who could place both girls in the care of defendant, which led ultimately to defendant's arrest in Boise. At defendant's trial for kidnapping, the testimony of a witness, who had been twice hypnotized prior to trial in order to refresh her memory, was presented. The first hypnosis session was conducted by a detective in the presence of the witness's attorney, another detective, two investigators, and an operator and recorder. Defense counsel was aware of the session, part of which was tape recorded. The existence of the second session was not revealed during discovery. The key portion of the witness's testimony consisted of having seen the two missing girls in defendant's house and also seeing the first husband in the house. Defendant was convicted of kidnapping, and appealed contending that the trial court erred in admitting the testimony of a witness who had been hypnotized to refresh her recollection.

The Idaho Supreme Court reversed and remanded by adopting a rule wherein trial courts are directed, in cases where hypnosis has been employed, to conduct pretrial hearings on the procedures used during the hypnotic session in question. Trial judges were then directed to apply a "totality of the circumstances" test and de-

termine whether, in view of all the circumstances, the proposed testimony is sufficiently reliable to merit admission. A dissenting judge favored a per se rule of inadmissibility. State v. Iwakiri, 682 P.2d 571 (1984), 21 CLB 85.

§ 13.180 Witness's assertion of privilege against self-incrimination —effect

Pennsylvania Defendant was accused of bludgeoning his victim to death and of robbery. Convicted of second-degree murder and robbery and sentenced respectively to life imprisonment and ten to twenty years concurrently, he filed a direct appeal. At the trial, his counsel had maintained that the defendant, who was 17 years old at the time of the incident in question, and suffered from organic brain damage and mild retardation, was, due to his diminished capacity, incapable of forming an intent to kill or commit robbery. The defense at trial was that he was guilty only of third-degree murder and theft. Among defendant's contentions on appeal was that the trial court erred in excluding testimony of a clinical psychologist offered by the defense to establish that he lacked the specific intent to commit robbery at, or about, the time of the murder. Defendant asserted that he should have been given the opportunity to establish diminished capacity sufficient to negate the requisite intent to commit robbery as a defense against the robbery charge and against application of the felony murder doctrine.

The query, posed on direct examination, that the trial court deemed inadmissible was, "Now, Dr. Cooke, were you able to form an opinion with a reasonable degree of scientific certainty as to whether or not Marvin Garcia [the defendant] had an intent to steal anything from Mrs. Schmidt prior to or before committing this homicide?" The Pennsylvania Supreme Court upheld the trial court's objection to this question.

The court held proper *psychiatric* testimony admissible only to negate the specific intent required to establish first-degree murder. Therefore, the determination of whether Garcia ever formed an intent to rob, and if so, when he formed such intent, had to be made on the basis of the factual circumstances surrounding the criminal episode as developed by demonstrative evidence and testimony other than psychiatric expert testimony.

The chief justice, concurring in the ruling on inadmissibility of the question, disagreed with the conclusion in the main decision that psychiatric testimony is admissible only to negate the specific intent required to establish first-degree murder. If proper evidence had been offered by the defense either psychiatric or otherwise, to negate the specific intent required by the underlying felony, that evidence should have been submitted to the jury for their assessment in the determination of the applicability of the felony murder principle to the case. Commonwealth v. Garcia, 479 A.2d 473 (1984), 21 CLB 187.

§ 13.195 Expert witnesses

California Defendant was convicted of murder and was sentenced to death. At trial it was established without dispute that the victim, a restaurant worker, took a break from his job at 4 P.M. to cash his paycheck. Shortly after 5 P.M. he was shot and killed by a man at a street intersection in Long Beach. The principal issue was the identity of the perpetrator. The prosecution presented seven witnesses who identified defendant as that person with varying degrees of certainty, and one eyewitness who categorically testified that defendant was not the gunman. The defense presented six witnesses who testified that defendant was in another state on the day of the crime. On appeal, defendant contended that the trial court abused its discretion in excluding the testimony of an expert witness on the psychological factors that may affect the accuracy of eyewitness identification.

The California Supreme Court, en banc, held that expert testimony informing the jury of certain psychological factors that may impair accuracy of a typical eyewitness identification, with supporting references to experimental studies of such factors, falls within the broad statutory description providing that the court or jury may consider in determining the credibility of a witness "any matter that has any tendency in reason" to bear on the credibility of a witness. However, in an ordinary case, the court stated, such evidence will not be needed; expert testimony will only be admitted when an identification is

a key element of the prosecution's case but is not substantially corroborated by other evidence. People v. McDonald, 690 P.2d 709 (1984), 21 CLB 263.

§ 13.220 Refreshing witness's recollection

North Carolina Defendant appealed his conviction for armed robbery on the ground that hypnotically refreshed testimony by his accomplice should not have been admitted at trial.

Overruling its decision in State v. McQueen, 244 S.E.2d 414 (1978), the North Carolina Supreme Court held the hypnotically refreshed testimony inadmissible and reversed the conviction. It cited the influence of recent scientific findings. "The overwhelming scientific evidence is that a subject under hypnosis is extremely susceptible to suggestion, has an often overwhelming desire to please the hypnotist, and is left, after hypnosis, with an inability to distinguish between prehypnotic memory and posthypnotic recall, which may be the product of either suggestion, confabulation or both." Further, the tendency of hypnosis to give a subject a false confidence in the accuracy of his posthypnotic recall "may actually nullify the safeguard of cross-examination." The court also cited the growing tendency in other courts to exclude hypnotically refreshed testimony, particularly the overruling in 1983 of the 1968 Maryland decision followed in *McQueen*. While the court did not hold the rule of inadmissibility applicable to all testimony of a previously hypnotized witness, it held that the party attempting to introduce testimony by a previously hypnotized witness must prove the proffered testimony was related prior to hypnosis. State v. Peoples, 319 S.E.2d 177 (1984), 21 CLB 182.

§ 13.315 Hearsay evidence

§ 13.370 —Photographs

Mississippi Defendant was convicted of the murder of his wife. Defendant, his wife, and his wife's two nephews had been drinking beer all day at defendant's home. Around 8:00 P.M. that evening, defendant carried his badly beaten wife to the hospital. She had been dead for two or three hours. Her death was the result of massive blood loss resulting from multiple bruises and abrasions to her body and deep lacerations of her scalp and labia. On appeal, defendant contended that the trial court erred in admitting into evidence a second group of photographs depicting the interior of defendant's home because the state failed to establish that the authorities entered the defendant's home pursuant to a lawful search warrant or with the defendant's consent. Therefore, it was argued, the photographs were inadmissible as the product of an illegal search. The defense counsel objected to these photographs of the home on the basis of "all of the same objections that I have stated previously as to the other photographs." One of the previous objections was that a proper predicate had not been laid for the introduction of the photographs. The state argued that this objection was not broad enough to encompass the Fourth Amendmend claim now raised by defendant.

The Mississippi Supreme Court applied the general rule that a failure to object with specificity in the trial court results in a waiver of review on appeal. The court held that the objection to the admissibility of the photographs of the interior of defendant's house was waived by the failure to state the additional basis for the objection in the trial court. Stevens v. State, 458 So. 2d 726 (1984), 21 CLB 269.

14. TRIAL

§ 14.00 Trial

§ 14.05 —Presence and conduct of bystanders

North Carolina Defendant, who murdered a woman with whom he had once lived, was convicted and sentenced to death. During the penalty phase of the trial, the defense was not permitted to introduce testimony by a criminologist whose statistical studies showed a link between the life stresses defendant had experienced and a tendency to commit violent crimes against close friends and family members. The criminologist would have given as his opinion that in cases like the defendant's, the violence was linked to a self-destructive impulse and was not likely to be directed against strangers. On appeal, the North Carolina Supreme Court held that the trial court was justified in excluding the testimony. It cited its decision in State v. Pinch, 292 S.E.2d 203 (1982), that

the presiding judge may "exclude repetitive or unreliable evidence or that lacking an adequate foundation" and described the criminologist's report as "of questionable scientific import or value in mitigation." (The dissenting opinion is articulate.) State v. Boyd, 319 S.E.2d 189 (1984), 21 CLB 182.

§ 14.41 —Defendant's right to testify

Colorado Defendant was convicted of first-degree assault by a jury. He did not testify at trial. During the trial, both after the prosecution rested and after the defense rested, defendant, his counsel, and the prosecutor appeared before the judge out of the presence of the jury. During these times, defendant did not speak to the judge about testifying or anything else. Immediately before the lunch recess following the presentation of defendant's case, defendant's trial lawyer told the judge that defendant would not testify, and the defense rested. When defendant returned from the lunch recess, he was intoxicated. The case was then submitted to the jury which found him guilty. Defendant moved for a new trial, and an evidentiary hearing was held on that motion. The motion was denied by the trial court which found that defendant's conduct in returning to the courtroom intoxicated after the noon recess demonstrated an intention not to testify. The Court of Appeals, however, ordered a new trial.

The Colorado Supreme Court, en banc, affirmed and held that a criminal defendant's right to testify is a fundamental constitutional right. The majority of the court reasoned that because the court had previously ruled that the right to testify may only be waived by a defendant in a criminal case, the right to testify is a fundamental constitutional right. The court added that waiver of a fundamental right must be voluntary, knowing, and intentional. The court imposed a duty on trial courts to erect procedural safeguards surrounding relinquishment of the right to testify in accordance with those set out in Johnson v. Zerbst, 304 U.S. 458 (1938). Whether there is proper waiver of the right should be clearly determined by the trial court. It would be "fitting and appropriate," the court stated, for that determination to appear upon the record. People v. Curtis, 681 P.2d 504 (1984), 21 CLB 86.

§ 14.150 Conduct of prosecutor

§ 14.155 —Improper questioning of witnesses

Florida Defendant, who was convicted of manslaughter, claimed that he struck the victim, a man with whom his daughter had once lived and subsequently quarreled, in defense of himself and his daughter. A bartender who witnessed the killing testified that defendant was a pleasant-seeming person whom he had never seen violent. The prosecutor asked the witness if he had heard of defendant's striking his wife on a date subsequent to the killing. The defense objected to the questioning and moved for a mistrial.

On appeal, the Florida Supreme Court held that the reference to the defendant's alleged violence toward his wife was reversible error. The prosecutor's claim that the question was intended to test the credibility of the witness was unpersuasive, since it was logical to conclude that the witness's testimony was limited to events prior to the date of the offense. An inquiry to establish a defendant's reputation for peacefulness is relevant only as of the date of the offense being tried. State v. Michaels, 454 So. 2d 560 (1984), 21 CLB 183.

§ 14.205 —Suppression of evidence

North Carolina Defendant was convicted of first-degree murder and felonious assault and was sentenced to death and twenty years' imprisonment. Defendant then filed a motion for appropriate relief including a motion for stay of execution. After a hearing, the superior court ruled defendant was entitled to a new trial solely because of the prosecution's failure to disclose certain evidence in its possession to defendant before trial.

The North Carolina Supreme Court granted certiorari and remanded the case indicating that pursuant to United States v. Argurs, 427 U.S. 97 (1976), on a challenge regarding the prosecution's failure to disclose nonrequested evidence, the central question involves the materiality of the withheld evidence. The court indicated that an assessment must be made of the impact the evidence would have had on the determination of defendant's guilt, for such a finding is permissible only if supported by evidence establishing guilt be-

yond a reasonable doubt. The court stated that materiality hinges on two factors: (1) "the strength of the evidence itself vis-à-vis the issue of guilt, and (2) the magnitude of the evidence of guilt which the convicting jury heard." "Accordingly," the court reasoned, "the reviewing court must view the additional evidence in light of the evidence used to convict defendant in determining whether it would likely have created a reasonable doubt as to defendant's guilt." The court selected the jury since it is the fact finder, not the trial judge, as the reviewer of the effect of this undisclosed evidence. Since it is the jury that determines guilt or innocence based solely on its evaluation of the evidence, reviewing courts must assess the undisclosed evidence as it would likely impact upon the jury. The proper standard to be applied is this: Would the evidence, had it been disclosed to the jury that convicted defendant, and in light of all other evidence the jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt? State v. McDowell, 310 S.E.2d 301 (1984), 21 CLB 82.

15. JURY

SELECTION

§ 15.15 Systematic exclusion of blacks, etc.

Florida Defendant, a black man, was convicted of second-degree murder and possession of a firearm in the commission of a felony. The charges stemmed from defendant's shooting of a black Haitian immigrant. The jury pool consisted of thirty-five prospective jurors, thirty-one whites and four blacks. The state used peremptory challenges to remove the first three blacks called. The defense objected to each of these challenges and moved to strike the entire pool. At this point, the trial court heard arguments as to whether the state's challenges were discriminatory and violated defendant's Sixth Amendment right to trial by an impartial jury. The trial judge held that the state did not have to explain its challenges and denied the defense motion. The court did, however, give each side five additional peremptory challenges. The defense then used all of its peremptory challenges in an effort to reach the remaining black prospective juror, who eventually served as an alternate juror. On certification of a question of great public importance to the Florida Supreme Court, defendant claimed that the trial court erred in denying his motion, thereby improperly allowing the state to exercise its peremptory challenges so as to exclude all blacks from his jury.

The Florida Supreme Court abandoned the requirements of Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965). *Swain* requires that "purposeful discrimination may not be assumed or merely asserted," but must be proved. The majority of the high court adopted a test that, once a threshold is passed, the burden of proof is placed on the party whose use of the challenges is questioned. The *Swain* test "impedes, rather than furthers," the state constitution's guarantee of an impartial jury, the court asserts. The first step under the new test is for the complaining party to show a "strong likelihood" that the other party is using its peremptory challenges in a discriminatory manner. At that juncture, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective juror's race. The reasons given need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties, witnesses, or characteristics of the juror other than race, then the inquiry should terminate. If the challenges are demonstrated to have been based solely on race, however, then the entire jury pool must be dismissed and a new one impaneled. State v. Neil, 457 So. 2d 481 (1984), 21 CLB 265.

§ 15.25 Conduct of voir dire

§ 15.36 —Challenges for cause

Mississippi Defendant was convicted of capital murder. On appeal, defendant claimed that it was an error for the state to challenge a potential juror for cause. The trial judge sustained the state's challenge. Defendant contended that his right to trial by a jury drawn from a fair and representative cross-section of the community in which the trial was held was denied in violation of the federal and state constitutions. The question presented on appeal was whether a potential juror, who on voir dire examination stated unequivocally that she

did not believe in capital punishment and that she would not vote for the death penalty, and also stated that this would not affect her vote on the question of guilt or innocence, may be excluded from the jury for cause in the context of the bifurcated trial required under state law.

The Mississippi Supreme Court found no error in the trial court's action sustaining the state's challenge for cause against a prospective juror, since the juror was so opposed to capital punishment that her service on the jury would have frustrated the state's legitimate efforts to administer its constitutionally valid death penalty scheme. Defendant insisted that he was entitled to have this juror serve at the guilt phase of his trial, and if that required the trial court to empanel a second separate jury to hear the sentencing phase, so be it. The supreme court stated that the trial court was free to employ a second jury if it wished, but it was not constitutionally required to do so. The court held that it was proper under state law that the same jurors who hear the guilt phase remain and continue to serve as the jurors at the sentencing phase of a capital murder trial. Jones v. State, 461 So. 2d 686 (1984), 21 CLB 378.

INSTRUCTIONS

§ 15.110 Credibility of witnesses

§ 15.115 —Defendant's failure to testify

Connecticut Defendant was convicted of murder and assault in the first degree, and he appealed the verdict.

The Connecticut Supreme Court set aside the judgment and ordered a new trial, partly on the ground of the trial court's failure to instruct the jury that it could not draw any inference from the defendant's decision not to testify. Defendant had requested the trial court to instruct the jury about his right not to do so under the Fifth and Fourteenth Amendments to the United States Constitution and Article First, § 8 of the Connecticut Constitution. The court was asked to add that "absolutely no inference of guilt can be drawn from the exercise by the accused of his constitutional right not to testify." The court instead instructed the jury, "An accused person is under no obligation to become a witness in his own behalf. Under our law, an accused person may either testify or not as he sees fit. It is for the State to prove him guilty and no burden rests upon him to prove his innocence."

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." That provision acts as a restraint on the individual states under the Fourteenth Amendment to the United States Constitution. The Connecticut counterpart, Article First, § 8 of the constitution similarly provides that no person shall be compelled to give evidence against himself. The United States Supreme Court has used these protections to construct a right to a "no-adverse-influence" instruction by the trial court; that is, that the jury may not draw inferences of guilt from a criminal defendant's exercise of that right when the defendant properly requests such an instruction. The court held that such an instruction is essential to the full and free exercise of the Fifth Amendment right against self-incrimination and to the system of justice that it is designed to uphold. Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 241 (1981).

The court, after noting that the right to such instruction is part of the Fifth Amendment right against self-incrimination, held that it extends to state trials by virtue of the Fourteenth Amendment. It then held that a criminal defendant has an independent right under Article First, § 8 of the Connecticut Constitution to the same no-adverse-inference instruction upon proper and timely request. While the instruction in this case occurred on May 26, 1977, before the *Carter v. Kentucky* decision, the Connecticut Supreme Court had held the *Carter v. Kentucky* rule was applicable to all convictions for which avenues of direct appeal had not been exhausted and times for appeal expired. Thus, the defendant in this case was entitled to the rule because this case was not final when the rule was announced. State v. Cohane, 479 A.2d 763 (1984), 21 CLB 185.

§ 15.155 Lesser included offenses

California Defendant was convicted by a jury of second-degree burglary. On appeal from his conviction, his principal contention was that the trial court erred in refus-

ing to instruct the jury, in accordance with defendant's theory of the case, that he could be convicted of vandalism, a related offense not necessarily included in burglary. Defendant's strategy at trial was an attempt to convince the jury that the evidence was susceptible of conflicting inferences, one of which was that he had no intent to steal when he broke the window to the restaurant, but did so in an outburst of anger and frustration because he had not been paid for his work at a discotheque that night by the owner. Had the jury accepted his theory of the case, and had it been permitted to do so, it should have convicted him of vandalism, for under the instructions given regarding circumstantial evidence, a conviction of burglary or attempted burglary would not have been proper. The trial court denied his request for an instruction on vandalism, however, on the ground that vandalism is not a lesser included offense that is necessarily included within the charged offense, burglary.

The California Supreme Court held that in the described circumstances, a defendant is entitled to instructions on a related but not necessarily included offense; therefore, defendant's request should have been granted. The court set forth guidelines for determining under what circumstances additional instructions are required as follows:

1. That "some basis" exists for finding the uncharged offense was committed:
2. That the uncharged offense be "closely related" to the charged offense; and
3. That defendant has relied at trial on a defense "consistent" with a conviction on the uncharged offense.

The court based its ruling on state guarantees of due process and the right to jury trial. People v. Geiger, 674 P.2d 1303 (1984), 21 CLB 80.

16. POST-TRIAL MOTIONS

§ 16.20 State habeas corpus—grounds

Connecticut Defendants petitioned for writs of state habeas corpus, alleging that their constitutional rights to timely prosecution of their appeals from their criminal convictions had been violated. Each of the petitioners had been convicted of a felony and was incarcerated. Each had filed a timely application that resulted in the appointment of the office of the chief public defender to represent the petitioners upon appeal. Due to delay, the ages of the pending appeals ranged from about two years to about four and one-half years. The delay experienced by the habeas petitioners resulted from the inadequate funding of the state public defender's office, which permitted a staff of only five attorneys to handle an appellate load that had grown from eighty-one cases in 1979 to 190 cases in 1983. The public defender's office had a policy of preparing appellate briefs in chronological order based on the date of sentencing since 90 percent of its clients were incarcerated. Compounding the problem was a similar shortage of attorneys in the chief state's attorney's office to file reply briefs. The Connecticut Supreme Court explained that the petitioners' constitutional claims require the court to balance the competing interests of the state in the finality of a criminal conviction and of the petitioners in fair and timely access to appellate review. The court pointed out that the petitioners, most of whom were serving concurrent sentences, had not actually been prejudiced to a great degree by the delays. The court stated that actual prejudice should play a relatively minor role in the balancing test. This is especially appropriate when a denial of equal protection is added to a due process violation as it was here. The protracted delays experienced by the petitioners resulted from their indigency since an appellant who can hire counsel has the opportunity to have briefs filed in six months or less. This disparity, the court concluded, resulted in a constitutional violation that is not mitigated by the high caliber of legal representation that indigent appellants eventually receive. The court remanded the habeas corpus petitions to the trial court to consider remedial alternatives other than unconditional discharge of the petitioners for the denials of due process, equal protection, and effective assistance of counsel that they have demonstrated. Gaines v. Manson, 481 A.2d 1084 (1984), 21 CLB 266.

17. SENTENCING AND PUNISHMENT

SENTENCING

§ 17.06 Right of defendant to represent himself

Illinois Defendant was convicted in a jury trial of two murders. He chose to represent himself at the sentencing hearing, made a confession in open court, and asked that the death penalty be imposed. The jury sentenced him to death, and he requested that the sentence be carried out without delay. Defendant waived the filing of a post-trial motion, but the circuit court appointed counsel to represent him on appeal. Defendant, through his counsel, appealed directly to the Illinois Supreme Court since such an appeal could not be waived.

The high court ruled that defendant, who was allowed to proceed pro se during the sentencing phase of his capital murder trial, was not entitled to have the death sentence set aside on automatic appeal on the basis of the trial judge's failure to order standby counsel to present mitigation evidence when it became clear defendant would not do so. The reviewing court observed that the trial court fully apprised the defendant of the substantive and procedural law involved in the sentencing proceeding. Defendant demonstrated an understanding of the law and asked intelligent questions, thereby indicating that his decision to represent himself, in the manner in which he did, was undertaken without any impairment of his reasoning ability. The court found that his waiver was a knowing and intelligent exercise of his right of self-representation under Faretta v. California, 422 U.S. 806 (1975). Nor did his *Faretta* right interfere with "society's interest in the fair administration of justice" in view of the fact that the sentencing jury was the same jury that heard the evidence at trial; therefore, it was not without any evidence that it could consider in mitigation of sentence. People v. Silagy, 461 N.E.2d 415 (1984), 21 CLB 80.

§ 17.10 Presentence report—contents

§ 17.15 —Right to examine presentence report

Arizona Defendant was convicted of sexual assault and sentenced to twenty-eight years in prison. While a motion for reconsideration was pending in the court of appeals, a newspaper publisher filed a motion seeking access to defendant's presentence report. Jurisdiction was transferred to the superior court for the purpose of deciding the publisher's motion. After a hearing, the court ordered that the presentence report be disclosed. Defendant appealed, contending that his presentence report should remain confidential in order to protect his state constitutional right of privacy.

The Arizona Supreme Court, en banc, declared that presentence reports are presumptively open to public inspection after sentencing is completed. The court pointed out that presentence reports are a "matter of public record unless otherwise provided by the court." While confidentiality may be preserved on a case-by-case basis, the court recognized that the public's need for information about the disposition of offenders is compelling, and that it is Arizona's public policy to fulfill that need. The court placed the burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, on the party that seeks nondisclosure rather than on the party that seeks access. Mitchell v. Superior Ct., 690 P.2d (1984), 21 CLB 263.

§ 17.40 Standards for imposing sentence

New Jersey Defendant was convicted of acts of intercourse with his 13-year-old stepdaughter in violation of a statute making such acts aggravated sexual assault, regardless of the presence or absence of force. The trial court sentenced the offender to sixty-three days in prison, five years' probation, and a $2,525 fine, and directed that he undergo psychiatric treatment. The state statute under which he was convicted did not expressly include a presumption of imprisonment until shortly before he was sentenced, and the trial court declined to apply the amendment retroactively. The state appealed the sentence, and the appellate division affirmed, and the New Jersey Supreme Court granted certification to clarify a 1981 amendment to the 1979 criminal code. In 1981, the code was amended to provide a presumption of imprisonment for all first- and second-degree crimes.

The high court concluded that the 1981

amendment should not be applied retroactively to this case. It found, however, that the undeniable thrust of the code's sentencing structure even before the 1981 amendment was to establish a general framework to guide judicial discretion in imposing sentences. The channeling of that discretion was premised on the new sentencing philosophy of the code, which was offense-oriented and did not focus on the rehabilitation of offenders. The court concluded that the trial court relied on precode sentencing guidelines. This approach balanced capacity for rehabilitation with the other purposes of punishment, rather than following the offense-oriented analysis of the code; therefore probationary sentences were precluded by the code even though defendant was a first-time offender convicted of aggravated sexual assault, a first-degree offense. State v. Hodge, 471 A.2d 389 (1984), 21 CLB 79.

19. PROBATION, PAROLE, AND PARDON

PROBATION

§ 19.00 Conditions for probation

Hawaii Defendant was convicted of promoting a dangerous drug in the second degree, pursuant to a guilty plea, and was placed on probation for five years on condition that she submit to searches and seizures of her person, property, and residence at any time. On appeal, defendant claimed that such a condition was an undue infringement of her constitutional right to be free of unreasonable searches and seizures.

The Hawaii Supreme Court stated that the particular probation condition imposed on defendant may well serve the legislative goal of the protection of the public; it does not, however, sufficiently further the other objective of probation, the rehabilitation of the offender. Furthermore, it was too restrictive of the liberty interest of defendant. The court doubted that near total surrender of privacy could be reasonably related to rehabilitation. The court held that any search by police of the probationer would probably be unrelated to either her prior conviction or her rehabilitation because the principal role of the police officer is to investigate and prosecute criminal activity. Therefore, the court concluded that the condition that the probationer be subjected to warrantless police searches was unconstitutional. A majority of the court found no such constitutional infirmity in subjecting defendant to warrantless searches by her probation officer given defendant's known proclivity for being involved in the trafficking of illicit drugs. Based on this, the court found the necessary connection between such searches and the rehabilitation of defendant. However, the court added, such warrantless searches by the probation officer would be unreasonable unless the officer could point to specific and articulable facts giving rise to a reasonable suspicion that drugs were being secreted by defendant. State v. Fields, 686 P.2d 1379 (1984), 21 CLB 269.

21. ANCILLARY PROCEEDINGS

JUVENILE PROCEEDINGS

§ 21.55 Juvenile proceedings

§ 21.65 —Right to due process

California A minor defendant sought a writ of mandamus to compel the respondent court to vacate an order declaring her unfit to be tried in juvenile court. She contended that the court erred in refusing to grant her immunity from use at trial of any statements she made in the fitness hearing or to her probation officer. The question on appeal was whether prior California law, which provided for such use immunities, was nullified by Section 28(d) of the California Constitution, an amendment adopted at a 1982 election. The People filed a murder charge in juvenile court because defendant was 17 years old at the time. Subsequently, the People moved to have her declared unfit for juvenile court proceedings. At the fitness hearing, the minor presented no evidence. She declined to testify on advice of counsel, and her attorney chose not to introduce a psychiatric evaluation prepared for the hearing on the ground that any incriminating statement made by her at the hearing could be used against her at a subsequent criminal trial. The probation officer concluded that she was not amenable to treatment in the juvenile system. The respondent court agreed because of the grav-

ity of her offense and the unlikeliness of her rehabilitation. Murder charges were pending against her in the superior court.

The California Supreme Court, en banc, held that Section 28(d) does not require that testimony a minor gives at a fitness hearing or statements he makes to his probation officer may not be used against him at a subsequent trial of the offense. The use immunities embodied in this rule were found to be mandated by the state constitutional privilege against self-incrimination. Ramona R. v. Superior Ct., 693 P.2d 789 (1985), 21 CLB 374.

PART III—FEDERAL CRIMES

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 24.05 Assault

U.S. Supreme Court Defendants were arrested for assaulting an undercover Secret Service agent with a loaded pistol in an attempt to rob him of $1,800 in "flash money" that the agent was using to buy counterfeit currency. After a jury trial, defendants were convicted of violating 18 U.S.C. § 114, which proscribes the assault and robbery of any custodian of "mail matter, or of any money or other property" of the United States. The Court of Appeals for the Eleventh Circuit affirmed the convictions, and certiorari was granted.

The Supreme Court affirmed, holding that the legislative history of Section 2114 indicates that there was no intent by Congress to limit the statute to postal crimes, and that government currency is "money or other property of the United States" under the statute. Garcia v. United States, 105 S. Ct. 479 (1984), 21 CLB 256.

§ 24.15 Bank-related crimes generally

Court of Appeals, 2d Cir. The district court granted defendants motion to dismiss several counts of an indictment charging violations of the reporting requirements of the Bank Secrecy Act, and they appealed.

The Court of Appeals for the Second Circuit vacated the dismissal and remanded, holding that the allegations in the indictments, if proven, would be sufficient to establish that defendants jointly engaged as a business in dealing in currency within the scope of the Bank Secrecy Act. The court found that since defendants helped a third party to place large amounts in foreign bank accounts without reporting such transfers, they could be construed to be a "financial institution" within the meaning of the statute, even though they themselves held no interest in the foreign bank accounts. United States v. Goldberg, 756 F.2d 949 (1985), 21 CLB 470.

§ 24.20 Bank robbery

Court of Appeals, 2d Cir. After defendant was convicted in the district court for armed robbery of a federally insured savings and loan association, he appealed on the ground that the federal statute did not apply to the bank in question.

The Court of Appeals for the Second Circuit affirmed the conviction, holding that, for a bank to fall within the protection of the federal bank robbery statute, a savings and loan association need not be specifically insured against bank robbery by the Federal Savings and Loan Insurance Corporation. Lord v. United States, 746 F.2d 942 (1984), 21 CLB 257.

§ 24.45 Conspiracy

Court of Appeals, 2d Cir. After defendant was convicted in the district court of conspiracy to distribute heroin, he appealed on the ground that the evidence supporting his conviction was insufficient.

The Court of Appeals for the Second Circuit affirmed in part and reversed in part, holding that the mere evidence that defendant helped a willing buyer locate a willing seller is insufficient to establish the existence of an agreement between the facilitator and the seller. The only evidence introduced against defendant was that he spoke to an unidentified individual, who then approached the undercover officer and consummated a drug deal. The court, however, affirmed the aiding and abetting conviction of defendant. United States v. Tyler, 758 F.2d 66 (1985), 21 CLB 469.

§ 24.90 False statement to federal department or agency

U.S. Supreme Court After defendant was indicted for making false statements to the FBI and the Secret Service, the district court granted his motion to dismiss and the Court of Appeals for the Eighth Circuit affirmed. Section 1001 of Title 18 makes it a crime to knowingly and willfully make a false statement "in any matter within the jurisdiction of any department or agency of the United States."

The Supreme Court reversed and remanded, holding that a criminal investigation falls within the meaning of "any matter" under the statute, and the FBI and the Secret Service qualify as departments or agencies of the United States. The Court thus rejected the more restrictive interpretation of the term "jurisdiction" as used in Section 1001 as meaning "the power to make final and arbitrary determinations" by finding that the term covers all matters confided to the authority of an agency or department. United States v. Rodgers, 104 S. Ct. 1942 (1984), 21 CLB 75.

§ 24.190 Mail fraud

Court of Appeals, 6th Cir. After defendants were convicted in the district court of mail fraud, they appealed on the ground that their alleged conduct was not proscribed by the mail fraud statute.

The Court of Appeals for the Sixth Circuit affirmed, holding that the evidence was sufficient to support the defendants' convictions for mail fraud based on their inducement of individuals to become mortgage brokers through false or fraudulent representations and further causing the new brokers and their clients to submit advanced fees to the defendants' companies in reliance on fraudulent representations. The court further found that the government was not required to prove that each defendant was a mastermind of the scheme as long as each defendant willfully participated in the scheme with knowledge of its fraudulent elements. United States v. Stull, 743 F.2d 439 (1984), 21 CLB 181.

§ 24.245 Selective Service violations

U.S. Supreme Court After the selective service registration system was activated in 1980, defendant wrote a letter to various government officials, stating that he had not registered and did not intend to do so. Subsequently, the selective service adopted a passive enforcement policy under which it investigated and prosecuted only those who advised that they had failed to register or were reported by others as having failed to register. Defendant was indicted pursuant to this policy but the district court dismissed the indictment on selective prosecution grounds. The court of appeals reversed, and certiorari was granted.

The Supreme Court affirmed, holding that the government's passive enforcement policy did not violate either the First or Fifth Amendments. The Court reasoned that defendant had failed to show that the government's enforcement policy selected nonregistrants for prosecution on the basis of their speech since the government prosecuted both those who reported themselves as well as those who were reported by others. The government thus treated all nonregistrants equally since it did not subject vocal nonregistrants to any special burden. Wayte v. United States, 105 S. Ct. 1524 (1985), 21 CLB 465.

§ 24.265 Wire fraud

Court of Appeals, 5th Cir. After defendant was convicted of aiding and abetting a wire fraud scheme, he appealed on the ground that he had never participated in any of the telephone calls on which the wire fraud charges were based.

The Court of Appeals for the Fifth Circuit affirmed the convictions, holding that defendant may be convicted of aiding and abetting wire fraud even though he did not participate in any of the telephone calls. The court noted that defendant's act of verifying information to a vendor's agent was part of a continuing scheme to defraud after a telephone call had taken place between the lender's agent and the principal. United States v. Westro, 746 F.2d 1022 (1984), 21 CLB 259.

27. DEFENSES

§ 27.00 Alibi

Court of Appeals, 4th Cir. Having exhausted his state remedies, defendant filed a writ of habeas corpus, claiming that he had been denied effective assistance of

counsel because his attorney did not object to an alibi instructions as having improperly shifted the burden of proof. He appealed from the denial of his petition.

The Court of Appeals for the Fourth Circuit affirmed, holding that the instruction telling the jury that the defendant did not have to prove his alibi beyond a reasonable doubt or even by a preponderance of the evidence, but had only to introduce evidence that created a reasonable doubt regarding guilt, was not an impermissible shift to the defendant of the prosecution's burden of proving every element of the crime charged beyond a reasonable doubt. The court reasoned that the instruction was no more than a comment on the weight of the evidence and had nothing to do with the burden of proof or the introduction of evidence. Frye v. Procunier, 746 F.2d 1011 (1984), 21 CLB 259.

§ 27.15 Entrapment

Court of Appeals, 5th Cir. After defendant was convicted of conspiracy to travel interstate with intent to distribute cocaine, he appealed on the ground that the government had improperly paid a contingency fee to an informant.

The Court of Appeals for the Fifth Circuit affirmed, holding that payment of a contingency fee to an informant does not violate due process as long as the government had not specifically targeted defendant or directed the informant to implicate him. United States v. Yater, 756 F.2d 1058 (1985), 21 CLB 469.

§ 27.20 Immunity from prosecution

Court of Appeals, 2d Cir. After defendant was convicted in the district court of conspiracy to commit various substantive offenses relating to fencing operations and related charges, he appealed on the ground that a statement made by him to a prosecutor had been improperly admitted.

The Court of Appeals for the Second Circuit affirmed the conviction, holding that statements made by defendant to the prosecutor two months after a grant of limited use immunity were admissible. The court noted that while any subsequent meetings with a defendant after a grant of limited use immunity should be preceded by a caution that the agreement is no longer in effect, there was no such ambiguity here where there was a full two-month interval between the meeting specified in the agreement and the meeting when defendant's statements were obtained. United States v. Golomb, 754 F.2d 86 (1985), 21 CLB 372.

PART IV—FEDERAL PROCEDURES

29. PRELIMINARY PROCEEDINGS

§ 29.00 Grand jury proceedings

U.S. Supreme Court After petitioner was indicted on federal fraud charges, he moved for dismissal of the indictment on the ground that there was discrimination in the grand jury selection process. The district court denied the motion, and the petitioner was convicted after a jury trial. The court of appeals affirmed.

The Supreme Court affirmed, holding that even assuming that there was discrimination in the selection of a grand jury foreman, such discrimination does not warrant reversal of petitioner's conviction. The Court reasoned that discrimination in the selection of a grand jury foreman, as distinguished from discrimination in the selection of the grand jury itself, does not in any sense threaten the interests of a defendant protected by the due process clause. Hobby v. United States, 104 S. Ct. 3093 (1984), 21 CLB 67.

§ 29.05 —Subpoenas

U.S. Supreme Court The IRS issued a summons requesting financial information for the petitioner-company as well as for licensees of the company. When petitioner refused to comply with the summonses, the government successfully brought an enforcement action in the district court, and the court of appeals affirmed, finding that prior judicial approval to serve an IRS summons is only necessary when the summons is to an identifiable party with whom it has no interest in order to investigate the tax liability of unnamed third parties.

The Supreme Court affirmed, holding that when the IRS serves a summons on a

known taxpayer with the dual purpose of investigating both that taxpayer's tax liability and that of unnamed third parties, it need not obtain prior judicial approval as long as the information sought is relevant to a legitimate investigation of the summoned taxpayer. Tiffany Fine Arts, Inc. v. United States, 105 S. Ct. 725 (1985), 21 CLB 368.

§ 29.10 —Immunity

Courts of Appeals, 5th Cir. Several grand jury witnesses were held in contempt by the district court for refusing to testify under a federal grant of immunity. On appeal, they argued that they refused to testify because they had a legitimate concern about state prosecution.

The Court of Appeals for the Fifth Circuit affirmed, holding that since the immunity provided a federal witness is coextensive with the Fifth Amendment, fear of state prosecution is insufficient grounds for a refusal to testify. The court observed that state courts are required to respect immunity granted under the federal immunity statute so the witnesses had no legitimate fear of state prosecutions based on testimony sought by the federal grand jury. *In re* Grand Jury Proceedings, 757 F.2d 1580 (1985), 21 CLB 467.

§ 29.20 Bail

Court of Appeals, 3d Cir. The district court determined after a hearing that defendant should be detained prior to trial on conspiracy and racketeering charges, and the defendant appealed.

The Court of Appeals for the Third Circuit affirmed, holding that in a detention hearing, a court may admit hearsay and refuse to subpoena witnesses whose out-of-court statements linked the defendant to the conspiracy and other crimes. United States v. Delker, 757 F.2d 1390 (1985), 21 CLB 469.

§ 29.35 Other preliminary proceedings

Court of Appeals, 2d Cir. After defendant was arrested on New York State charges for the criminal sale and possession of cocaine, his request for a preliminary hearing was denied by the Nassau County District Attorney's Office. Defendant was subsequently indicted by a grand jury and was found guilty after trial. While his appeal was pending, defendant brought a civil rights action based on an alleged unconstitutional deprivation of the right to a preliminary hearing. The district court dismissed the civil rights action, and an appeal was taken.

The Court of Appeals for the Second Circuit affirmed the district court, holding that federal courts should abstain from enjoining pending state court criminal proceedings when there is no showing of bad faith, harassment, or other unusual or extraordinary circumstances. The court further commented that defendant here was free on bail during the entire state proceedings, so this was not a case of pretrial detention without the right to a probable cause hearing. Morano v. Dillion, 746 F.2d 942 (1984), 21 CLB 257.

§ 29.40 Right to have interpreter

U.S. Supreme Court Respondent was convicted in the district court of violating Section 1001 for making false statements furnished to a defense contractor-employer in connection with a Department of Defense security questionnaire. At trial, the district court rejected his request for a jury instruction that the statement must have been made with knowledge that it related to a matter within the jurisdiction of a federal agency. The court instead charged that the government must prove that the respondent "knew or should have known" that the information was to be submitted to a federal agency. The court of appeals reversed.

The Supreme Court reversed, holding that the plain language and legislative history of Section 1001 established that proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction under the statute. The Court observed that any natural reading of Section 1001 establishes that the terms "knowingly and wilfully" modify only the making of "false, fictitious or fraudulent statements," not the circumstances that those statements be made in a matter within the jurisdiction of a federal agency. United States v. Yermian, 104 S. Ct. 2936 (1984), 21 CLB 75.

30. INDICTMENT AND INFORMATION

§ 30.00 In general

U.S. Supreme Court Defendant was indicted on mail fraud charges for having

allegedly defrauded his insurer in connection with a burglary of his business both by consenting to the burglary in advance and by lying to the insurer about the value of the loss. Prior to trial, however, the government struck the allegation relating to his prior knowledge of the burglary, and he was convicted only on the charge relating to the false statement. Defendant appealed on the ground that the proof at trial fatally varied from the scheme alleged in the indictment, and the court of appeals reversed.

The Supreme Court reversed, holding that as long as the crime and the elements thereof are fully and clearly set forth in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or means of committing it. The Court reasoned that defendant was not deprived of any substantial rights because he was tried on an indictment that clearly set out the offense for which he was committed. The Court thus rejected the argument that a narrowing of an indictment constitutes an "amendment" rendering the indictment void. United States v. Miller, 105 S. Ct. 1811 (1985), 21 CLB 464.

31. PRETRIAL MOTIONS

§ 31.00 Sufficiency of indictment

§ 31.10 —Procedure for dismissing indictment

Court of Appeals, 4th Cir. After defendants were convicted in the district court of assault and kidnapping charges, and acquitted on conspiracy and attempted escape charges, they appealed on the ground that the charges had been improperly joined at one trial.

The Court of Appeals for the Fourth Circuit affirmed in part and reversed in part on other grounds, holding that joinder of the charges was proper because the charges were connected in that they arose from the same occurrence and there was no potential for unfair prejudice because the evidence for each of the charges was admissible in proving each of the other charges. The court further found that acquital on conspiracy and attempted escape charges did not establish misjoinder because the propriety of the joinder is determined at the time of the indictment, not retrospectively after a verdict. United States v. Lorick, 753 F.2d 1295 (1985), 21 CLB 371.

§ 31.15 Motions by indigent defendant

§ 31.20 —Court-appointed psychologist

U.S. Supreme Court After defendant was charged with first-degree murder and related charges, he was examined by a court-appointed psychiatrist and found to be incompetent to stand trial. However, after six weeks in a mental hospital, he was found to be competent if sedated with prescribed drugs. Defense counsel's motion for a psychiatric evaluation at state expense was denied, and defendant was convicted after trial on all counts and sentenced to death. The Oklahoma Court of Criminal Appeals affirmed, and certiorari was granted.

The Supreme Court reversed, holding that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide psychiatric assistance to an indigent defendant. The Court noted that without a psychiatrist's assistance in conducting a professional examination of issues relevant to the insanity defense, to help determine whether that defense is viable, to present testimony, and to assist in preparing for cross-examination of the state's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. Ake v. Oklahoma, 105 S. Ct. 1087 (1985), 21 CLB 466.

32. DISCOVERY

§ 32.00 In general

§ 32.20 —Identity of informants

U.S. Supreme Court After defendant was convicted of first-degree murder in a Florida state court and sentenced to death, he argued on appeal that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment, but the Florida Supreme Court affirmed the conviction and sentence. His habeas corpus petition was denied by the district court, but the court

of appeals reversed and granted the writ, applying the standard that a juror may properly be excluded for cause if he makes it "unmistakably clear" that he would "automatically" vote against capital punishment.

The Supreme Court reversed, holding that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." The Court thus dispensed with the requirement that a juror's bias lead to "automatic" decisionmaking and that it be established with "unmistakable clarity." Wainwright v. Witt, 105 S. Ct. 844 (1985), 21 CLB 368.

33. GUILTY PLEAS

§ 33.00 Plea bargaining

§ 33.05 —Right to enforce plea bargain

U.S. Supreme Court After defendant was convicted of murder and other charges, the Arkansas Supreme Court set aside the murder conviction. The prosecutor made one plea proposal, but when defense counsel called the prosecutor three days later to accept the offer, the prosecutor told counsel that a mistake had been made and withdrew the offer. He instead proposed a second offer, which was ultimately accepted and a twenty-one-year sentence was imposed to be served consecutively with previous sentences. After exhausting state remedies, defendant's previous habeas corpus petition in the district court was dismissed, but the court of appeals reversed.

The Supreme Court reversed, holding that the defendant's acceptance of the prosecutor's first plea offer did not create a constitutional right to have the bargain successfully enforced, and he may not successfully attack his subsequent guilty plea. The Court observed that the guilty plea was made voluntarily and intelligently because defendant's plea was not induced by the prosecutor's withdrawn offer, and it rested on no unfulfilled promise. Mabry v. Johnson, 104 S. Ct. 2543 (1984), 21 CLB 77.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 34.15 Relevancy and prejudice

Court of Appeals, 5th Cir. After defendant was convicted in the district court of filing materially false tax returns, he appealed on the ground that the district court had improperly admitted evidence based on allegations that he had failed to report income received for attempted assassinations.

The Court of Appeals for the Fifth Circuit affirmed the conviction, holding that defendant was not unfairly prejudiced by admission of evidence concerning the attempted assassinations where the trial court diligently and effectively restricted the government's proof to what was relevant to show source of income and motive. United States v. Tafoya, 757 F.2d 1522 (1985), 21 CLB 468.

§ 34.45 Proof of other crimes to show motive, intent, etc.

Court of Appeals, 2d Cir. After defendant was convicted in the district court of bank robbery, he appealed on the ground that a prior robbery conviction had been improperly admitted at trial.

The Court of Appeals for the Second Circuit affirmed, holding that the trial court has not abused its discretion in ruling that defendant's prior robbery conviction was admissible for impeachment purposes. The court further noted that, in order to preserve the issue for review, defendant must establish on record that he would in fact take the stand and testify if the challenged prior convictions are excluded and sufficiently outline the nature of his testimony so that the trial and appellate courts can do the necessary balancing. United States v. Washington, 746 F.2d 104 (1984), 21 CLB 261.

§ 34.125 Coerced testimony

Court of Appeals, 9th Cir. After defendants were convicted of first-degree murder and robbery, they appealed on the ground that the testimony of a witness who had undergone a sodium amytal interview before trial should have been excluded.

The Court of Appeals for the Ninth Circuit affirmed, holding that the trial court's

refusal to exclude one witness's testimony because he had undergone a sodium amytal interview did not constitute an abuse of discretion. The court noted that the sodium amytal examination had been conducted under the direction of a board certified psychiatrist, and that there was no evidence to indicate that the examination was in any way suggestive or leading. United States v. Solomon, 753 F.2d 1522 (1985), 21 CLB 372.

§ 34.150 Expert witness

Court of Appeals, 3d Cir. After defendant was convicted in the district court on charges of mail fraud, wire fraud, and related charges, he appealed on the ground that the court had improperly denied his application to introduce expert testimony regarding the unreliability of eyewitness identification testimony.

The Court of Appeals for the Third Circuit vacated and remanded, holding that the trial court's failure to permit a defense psychiatrist to testify was not harmless, since defendant was convicted solely on the basis of eyewitness testimony. The court thus concluded that, under certain circumstances, expert testimony on the reliability of eyewitness identification can assist the jury in reaching a correct decision and, therefore, may meet the "helpfulness" requirement of Rule 702 of the Federal Rules of Evidence pertaining to expert testimony. United States v. Downing, 753 F.2d 1224 (1985), 21 CLB 372.

Court of Appeals, 5th Cir. After defendants were convicted in the district court of various crimes arising out of their use of personal "churches" to evade taxes, they appealed on the ground that the trial judge had improperly excluded the testimony of an expert defense witness.

The Court of Appeals for the Fifth Circuit affirmed, holding that the preferred witness's interpretations regarding the legality of the tax avoidance scheme had little probative value on the issue of defendants' state of mind at the time they acted because there was no evidence that they relied on his opinion at the time they acted. The court further noted that there was a great possibility of confusing the jury since the expert witness may have given a statement of the law that would be at variance with the judge's jury charge. United States v. Daly, 756 F.2d 1076 (1985), 21 CLB 470.

§ 34.160 Disclosure of identity of informants

Court of Appeals, 2d Cir. When a police officer refused to comply with the district court's order that he disclose the names of two informants, he was held in contempt by the court and fined $100 for each day he continued in contempt.

On appeal, the Court of Appeals for the Second Circuit vacated the contempt order, holding that the police officer should not have been held in civil contempt for having refused to disclose the names of the two informants. The court reasoned that the government's privilege to maintain the confidentiality of its informants' identities should not be breached unless disclosure is essential to the defense, such as when the informant is a key witness, a participant in the crime charged, or someone else whose testimony would be significant in determining guilt or innocence. Informant identities should not, however, be disclosed where, as in this case, it was argued that it was needed to challenge the credibility of a witness who controlled the informant. United States v. Russotti, 746 F.2d 945 (1984), 21 CLB 257.

§ 34.170 Cross-examination procedure

§ 34.207 —Impeachment by showing bias of witness

U.S. Supreme Court After defendant was convicted in the district court of bank robbery, he appealed on the ground that evidence of his membership in a prison gang had been improperly admitted against him. The Court of Appeals for the Ninth Circuit reversed, and a petition for certiorari was filed.

The Supreme Court reversed, holding that evidence of a witness's and a defendant's common membership in an organization that has a creed requiring members to lie for each other is admissible for impeachment purposes to show bias. The court further held that evidence indicating the full description of the prison gang and its tenants was admissible since the type of organization in which a witness and a party share membership may be relevant to show the source and strength of the

witness's bias. United States v. Abel, 105 S. Ct. 465 (1984), 21 CLB 255.

§ 34.225 Admissions and confessions

§ 34.230 —Business records exception

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of possession of a firearm following a felony conviction, he appealed on the ground that a Bureau of Alcohol, Tobacco & Firearms tracer form had been improperly admitted as a business record to show the weapon's movement in interstate commerce.

The Court of Appeals for the District of Columbia reversed, holding that the BATF tracer form should not have been admitted under the business records exception to the hearsay rule even though the actual records of the manufacturer, if properly authenticated, would have been admissible. The court explained that the document was prepared in response to a government request rather than prepared in the ordinary course of business. United States v. Houser, 746 F.2d 55 (1984), 21 CLB 260.

§ 34.235 —Declarations of co-conspirators

Court of Appeals, 4th Cir. After defendant was convicted in district court of conspiracy to illegally possess drugs with intent to distribute, he appealed on the ground that the district court had improperly admitted out-of-court statements of co-conspirators.

The Court of Appeals for the Fourth Circuit affirmed, holding that the district court had properly admitted the out-of-court statements of co-conspirators made in March even though the indictment charged that the conspiracy had started in April. The court explained that the evidence that the conspirators had engaged in drug transactions in March constituted the "substantial independent evidence" necessary under Rule 801(d)(2)(E) to prove that the conspiracy existed. United States v. Jackson, 757 F.2d 1486 (1985), 21 CLB 468.

Court of Appeals, 5th Cir. After defendant was convicted in the district court of attempting, by means of an incendiary device, to destroy a building affecting interstate commerce, he appealed on the ground that hearsay evidence had been improperly admitted against him.

The Court of Appeals for the Fifth Circuit affirmed, holding that where a witness had invoked his Fifth Amendment privilege and refused to testify, the witness was "unavailable" for purposes of the admission of his statement as a declaration against penal interest under Federal Rule of Evidence 804(b)(3). The court further commented that the unavailable witness's declaration against penal interest (i.e., admitting his participation in the arson of a business owned in part by defendant) was fully corroborated by the evidence and shown to be trustworthy. United States v. Briscoe, 742 F.2d 842 (1984), 21 CLB 178.

Court of Appeals, 7th Cir. After defendant was convicted in the district court of conspiracy and interstate transportation of stolen goods, he appealed, among other things, on the ground that co-conspirator statements were improperly admitted against him.

The Court of Appeals for the Seventh Circuit affirmed, holding, inter alia, that the trial court correctly ruled that sufficient nonhearsay evidence established the stolen steel conspiracy, and thus correctly found that videotaped statements of a separately tried defendant were properly admitted as co-conspirator statements made during the course of and in furtherance of the conspiracy. United States v. Murvine, 743 F.2d 511 (1984), 21 CLB 182.

35. THE TRIAL

§ 35.20 Absence of defendant or counsel

U.S. Supreme Court During the trial of four defendants on cocaine distribution conspiracy charges, an in camera conference was held with one of the jurors. The judge and one of the defense counsel were present during this conference, where the juror expressed concern that one defendant was sketching portraits of the jury. No objections to this procedure were made by other defense counsel and none of the others requested that they be present. After all defendants were convicted, the Court of Appeals for the Ninth Circuit reversed.

The Supreme Court reversed, holding that the due process clause was not vio-

lated by the in camera discussion with the juror. The Court observed that the defense has no constitutional right to be present at every interaction between a judge and juror, and counsel could have done nothing had they been at the conference or gained anything by attending. The Court further found that the failure of defense counsel to express desire to be present or object to their exclusion constituted a waiver under Rule 43. United States v. Gagnon, 105 S. Ct. 1482 (1985), 21 CLB 466.

Court of Appeals, 2d Cir. After defendant was convicted in state court of possession of stolen property, he petitioned the district court for habeas corpus relief. The district court granted the petition, and the state appealed.

The Court of Appeals for the Second Circuit reversed, holding that the state court's determinations after a hearing on the merits of the issue of defendant's exclusion from his trial must be presumed to be correct unless it is unsupported by the record. In this case, the court noted that the state court made an implied factual determination that defendant's obstreperous behavior justified his exclusion from the courtroom. Saccomanno v. Scully, 758 F.2d 62 (1985), 21 CLB 467.

§ 35.100 Discretion to prosecute

§ 35.110 —Comments made during summation

U.S. Supreme Court After defendant was convicted in the district court of mail fraud and knowingly making false statements to a government agency, he appealed on the grounds that prosecutorial remarks made during the trial required reversal. In his rebuttal argument, the prosecutor stated his opinion that the defendant was guilty and urged the jury to "do its job." The Court of Appeals for the Tenth Circuit reversed, and certiorari was granted.

The Supreme Court reversed, holding that, upon reviewing the entire record, the prosecutor's remarks in this case did not rise to the level of plain error. The Court reasoned that the remarks, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice. The Court specifically took into account that the prosecutor was responding to defense counsel's closing arguments, which impugned the prosecutor's integrity. United States v. Young, 105 S. Ct. 1038 (1985), 21 CLB 465.

Court of Appeals, 1st Cir. During closing arguments, the prosecutor commented that the jury should "see if [the defendant] can explain the story." The district court immediately interrupted the prosecutor and reminded the jury that defendant had no obligation to prove anything.

The Court of Appeals for the First Circuit affirmed the conviction, holding that while the prosecutor's comments were improper since they commented upon defendant's failure to testify and shifted the burden of proof, the error was harmless in light of the overwhelming evidence against defendant. The court cautioned that it was equally improper for a prosecutor to rhetorically ask whether "counsel can explain," since defense counsel and defendant must be considered as one. United States v. Skandier, 758 F.2d 43 (1985), 21 CLB 467.

36. THE JURY

SELECTION

§ 36.10 Systematic exclusion of minority group members

U.S. Supreme Court The state of California applied for a stay of a judgment of the California Supreme Court reversing a capital murder conviction on the basis that the trial jury was not drawn from a fair cross-section of the community. The California Supreme Court had found that there was a substantial disparity between the representation of Blacks and Hispanics on the voter lists as compared to their representation in the population at large.

Justice Rehnquist, as Circuit Justice, denied the stay, finding that since it appeared that the state had failed to preserve for appeal one of the issues that was presented to the Supreme Court, it was doubtful that the case would attract enough votes in the Supreme Court to grant certiorari. California v. Harris, 105 S. Ct. 1 (1984), 21 CLB 254.

§ 36.40 Exposure of jurors to prejudicial publicity

U.S. Supreme Court After a Pennsylvania jury trial leading to defendant's conviction

of first-degree murder and rape, he was sentenced to life imprisonment. However, the Pennsylvania Supreme Court reversed after finding that defendant's confession had been improperly obtained. During voir dire for a second trial, defendant's motion for a change of venue based on the dissemination of prejudicial information was denied, and he was convicted. The trial court found that there was practically no publicity between the two trials and that the jury was unbiased. After the Pennsylvania Supreme Court affirmed and the district court denied habeas corpus relief, the court of appeals reversed.

The Supreme Court reversed, holding that the voire dire testimony and the record of publicity did not reveal the kind of "wave of public passion" that would have made a fair trial unlikely. The Court also ruled that a trial court's findings of impartiality may be overturned only for manifest error. The fact that the majority of the panel "remembered the case" but nothing more was essentially irrelevant in the Court's view. Patton v. Yount, 104 S. Ct. 2885 (1984), 21 CLB 76.

INSTRUCTIONS

§ 36.85 Duty to charge on defendant's theory of defense

Court of Appeals, 2d Cir. Following their conviction in the district court of unlicensed exportation of firearms, defendants appealed, inter alia, on the ground that the district court had failed to instruct the jury on the defense of reasonable reliance on the apparent authority of an informant.

The Court of Appeals for the Second Circuit affirmed the conviction, holding that defendants were not entitled to an instruction on the defendants' theory of reasonable reliance on the apparent authority of an FBI informant since they had failed to establish that the behavior of government officials and the informant was so outrageous and shocking as to deprive them of due process of law, especially in view of the evidence that one defendant admitted that it was he who sought out the informant for assistance in gun-running activities. United States v. Duggan, 743 F.2d 59 (1984), 21 CLB 179.

§ 36.115 Lesser included offenses

U.S. Supreme Court After respondent driver was stopped by the police and failed to perform a field sobriety test without failing, he responded to questioning by saying that he had consumed two beers and smoked marijuana a short time before. Respondent was then arrested and questioned further, whereupon he stated that he was "barely" under the influence of alcohol. At no time was he given any *Miranda* warnings. Respondent was then charged with misdemeanor offenses and convicted. The district court dismissed his habeas corpus petition, but the court of appeals reversed.

The Supreme Court affirmed, holding that a person subjected to custodial interrogation is entitled to the benefit of *Miranda* safeguards, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested. Thus, respondent's statements made at the station house were inadmissible since he was "in custody" at least as of the moment he was formally arrested and instructed to get into the police car. Berkemer v. McCarty, 104 S. Ct. 3138 (1984), 21 CLB 66.

U.S. Supreme Court At petitioner's trial for first-degree murder, the Florida trial court informed him that it would instruct the jury on lesser included offenses if he would waive the statute of limitations, which had expired as to those offenses. The jury was instructed solely on capital murder when petitioner refused to waive the statute. He was found guilty of first-degree murder, and although the jury recommended life imprisonment, the trial court imposed the death sentence. The Florida Supreme Court affirmed the conviction but reversed the death sentence because respondent had not been provided access to a portion of the presentence report. On remand, the Florida Supreme Court affirmed.

The Supreme Court affirmed, holding that it was not error for the trial judge to refuse to instruct the jury on lesser included offenses. The Court reasoned that since no lesser included offense was available because of the running of the statute, a lesser included offense instruction would have detracted from rather than enhanced the rationality of the jury deliberation pro-

cess. Spaziano v. Florida, 104 S. Ct. 3154 (1984), 21 CLB 66.

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of possession of narcotics with intent to distribute, he appealed on the ground that the trial court had improperly denied his request for a jury instruction as to a lesser included offense.

The Court of Appeals for the District of Columbia affirmed, holding that the district court did not err in refusing defendant's request for an instruction as to the lesser included offense of simple possession of narcotics since there was no rational basis for a charge of mere possession. The court reasoned that where, as here, defendant presents a totally exculpatory defense, the lesser included offense should not be given where the prosecution case provides no rational basis for the jury's finding that defendant was guilty of the lesser included offense. United States v. Thornton, 746 F.2d 39 (1984), 21 CLB 260.

§ 36.120 Limiting and cautionary instructions

U.S. Supreme Court After defendant was convicted in Kentucky state court of second-degree burglary and related charges, he appealed on the ground that the court had not complied with his request for a *Carter* admonition (i.e., that no adverse inference be drawn from his failure to testify) rather than a *Carter* "instruction." The Kentucky Supreme Court affirmed the conviction.

The Supreme Court reversed, holding that in the circumstances of this case, the failure to respect petitioner's constitutional rights was not supported by an independent and adequate state ground. The Court observed that there was nothing in the record to reveal that the petitioner's reference to an "admonition" meant that he was insisting on an oral statement to the jury and nothing else. James v. Kentucky, 104 S. Ct. 1830 (1984), 21 CLB 72.

VERDICTS

§ 36.220 Inconsistent verdicts

U.S. Supreme Court After defendant was acquitted on conspiracy and possession charges and convicted of using the telephone in facilitation of the alleged conspiracy and possession, he appealed on the ground that the verdict was inherently inconsistent. The Court of Appeals for the Ninth Circuit reversed, and certiorari was granted.

The Supreme Court reversed and reinstated the convictions, holding that acquittal on conspiracy and possession of cocaine charges did not require that a telephone "facilitation" count be vacated. The Court reasoned that although the verdicts may not be rationally reconciled, vacation of the convictions would be imprudent since it would require inquiry into the jury's deliberations, a course of action that courts will generally not undertake. United States v. Powell, 105 S. Ct. 471 (1984), 21 CLB 255.

§ 36.235 Juror's impeachment of verdict

Court of Appeals, 5th Cir. After defendant was convicted in the district court of transporting illegal aliens, he appealed on the ground that the jury verdict had not properly been reached since his attorney received a call from a juror indicating that the guilty verdict was not truly his own.

The Court of Appeals for the Fifth Circuit affirmed, holding that the evidence did not support a claim that the jury engaged in any misconduct or based its verdict on matters outside the record or other improper considerations. The court noted that only where there is a showing of illegal or prejudicial intrusion into the jury process will the court sanction an inquiry. United States v. Varela-Andujo, 746 F.2d 1046 (1984), 21 CLB 260.

37. POST-TRIAL MOTIONS

§ 37.35 Federal habeas corpus

Court of Appeals, 4th Cir. After defendant was convicted of murder, criminal sexual conduct, armed robbery, and kidnapping, habeas corpus relief was sought in the district court on the ground that he should have been entitled to a hearing as to whether he had Huntington's Disease (HD). HD is an inherited disorder that manifests itself in involuntary movements and emotional disturbance. Defendant's mother had been diagnosed as having HD,

which gave defendant a 50 percent chance of having the disease.

The Court of Appeals for the Fourth Circuit affirmed the denial of habeas corpus relief, holding that defendant was not entitled to an evidentiary hearing concerning HD. The court noted that medical literature confirmed trial testimony that no technique was available to make a presymptomatic detection of HD, and even if defendant had the disease, that fact would not alter his conviction and death sentence. Roach v. Martin, 757 F.2d 1463 (1985), 21 CLB 468.

§ 37.75 Motion to modify sentence

Court of Appeals, 1st Cir. After defendant's motion to correct or reduce his five-year sentence for distributing material involving sexual exploitation of minors was denied in the district court, he appealed.

The First Circuit affirmed the district court, holding that the defendant's failure to bring his motion within 120 days of sentence or from the day of the Supreme Court's denial of his petition for writ of habeas corpus under Rule 35 deprived the district court of the power to consider the motion. The court further commented on the merits of the defendant's claim, stating that defendant had failed to establish that the five-year sentence was imposed in an illegal manner since he showed neither that the contents of a purported ex parte report were communicated to the district court nor that the court had relied on erroneous information in sentencing. United States v. Ames, 743 F.2d 46 (1984), 21 CLB 179.

Court of Appeals, 8th Cir. After defendant was found guilty of conspiracy to deliver cocaine and distribution of cocaine, he brought a motion for reduction of sentence, which was denied by the district court without a hearing.

On appeal, the Court of Appeals for the Eighth Circuit affirmed, holding that the district court's failure to order an evidentiary hearing on the motion to reduce sentence was not an abuse of discretion. The court rejected the defense argument that the trial judge based his decision on defendant's failure to present his version of the facts at trial or sentencing, observing that the motion was denied on other grounds—namely, that defendant offered no new facts that were not previously considered by the district court and that the sentence was correct. United States v. Kadota, 757 F.2d 198 (1985), 21 CLB 470.

38. SENTENCING AND PUNISHMENT

SENTENCING

§ 38.35 Invalid conditions

Court of Appeals, 1st Cir. After defendant was convicted in the district court of transporting fraudulently obtained checks in interstate commerce, he appealed on the ground that the court had imposed an illegal sentence on him by sentencing him to two years in jail followed by two years of probation conditioned upon his making "restitution in the amount of $32,577.98."

The Court of Appeals for the First Circuit affirmed the conviction but modified the restitution by $18,000 since it found that the evidence with respect to an "$18,000 loan" was insufficient to require restitution of that amount. The court further found that the Victim and Witness Protection Act of 1982 did not apply to offenses occurring before 1983 but, on the contrary, those acts were governed by a statute that allows restitution only of actual damages as a special condition of probation. United States v. Ferrera, 746 F.2d 908 (1984), 21 CLB 256.

Court of Appeals, 3d Cir. After defendants pleaded nolo contendere to indictments under the Sherman Act, the district court judge placed the corporate defendants on supervised probation on the special condition that they devote $100,000 worth of their services for charitable purposes.

The Court of Appeals for the Third Circuit issued a writ of mandamus and remanded for resentencing, holding that the district court had exceeded its authority by making the charitable contributions a special condition of probation since no charitable organizations were aggrieved by the offense. The court further noted that the amount of restitution ordered as a condition of probation may be only for such amount of actual damage or loss as has been determined to a certainty by a court or by stipulation of the parties. United States v. John Scher Presents, Inc., 746 F.2d 959 (1984), 21 CLB 258.

§ 38.50 Resentencing

U.S. Supreme Court After defendant was convicted of first-degree murder and armed robbery, he appealed, and the Supreme Court remanded for resentencing. On remand, the Arizona Superior Court imposed the death penalty, and the Arizona Supreme Court reversed.

The Supreme Court affirmed, holding that the double jeopardy clause prohibited Arizona from resentencing respondent to death after a life sentence was set aside on appeal, notwithstanding that failure to initially impose the death penalty was based on misconstruction of the capital sentencing law defining the aggravating circumstance of "pecuniary gain." The Court reasoned that reliance on an error of law does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits of the issue in the sentencing hearing, namely, whether death was the appropriate punishment for respondent's offense. Arizona v. Rumsey, 104 S. Ct. 2305 (1984), 21 CLB 72.

U.S. Supreme Court After the defendant's conviction for passport offenses, he was sentenced to two years in prison, of which six months was suspended. Thereafter, the passport conviction was reversed by the court of appeals, and he was retried on the same charges and convicted. On resentencing, a two-year sentence was imposed, none of which was suspended. The judge explained that he imposed the greater sentence because of the defendant's intervening conviction for possession of counterfeit certificates of deposit. The court of appeals affirmed.

The Supreme Court affirmed, holding that a judge may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceeding. Wasman v. United States, 104 S. Ct, 3217 (1984), 21 CLB 68.

PUNISHMENT

§ 38.105 Consecutive sentences

Court of Appeals, 3d Cir. After defendant was convicted on four RICO counts in connection with an arson-for-hire ring, he was sentenced to two consecutive twenty-year terms: one for a RICO substantive count and one for a RICO conspiracy count. Defendant then moved for correction and reduction of his sentence, alleging that the two RICO counts had merged for sentencing purposes.

The Court of Appeals for the Third Circuit affirmed the judgment of the district court, holding that the "enterprise" element under the RICO substantive count did not merge with the RICO conspiracy count since it can be committed by an individual acting alone, while a conspiracy "enterprise" under the RICO statute cannot. The court thus concluded that consecutive sentences could be imposed since each count required proof that the other did not. United States v. Marrone, 746 F.2d 957 (1984), 21 CLB 258.

39. THE APPEAL

§ 39.00 Right to appeal

Court of Appeals, 7th Cir. The government filed a motion for disqualification of defense counsel in a criminal prosecution because of the attorney's prior representation of a government witness. The district court denied the motion, and the government appealed.

The Court of Appeals for the Seventh Circuit dismissed the appeal, holding that the denial of a motion to disqualify a defense attorney in a criminal case because of the attorney's prior representation of a government witness is not appealable before trial. The court observed that although the issue raised by the denial of the motion to disqualify the defense attorney might properly have been one to certify for interlocutory appeal, the section governing certifications is applicable only to civil cases. United States v. White, 743 F.2d 488 (1984), 21 CLB 181.

41. PRISONER PROCEEDINGS

§ 41.00 In general

U.S. Supreme Court An inmate of a Virginia institution filed a Section 1983 suit against an officer, alleging that he had conducted an unreasonable "shakedown" search. The district court granted summary judgment for the petitioner, and the court of appeals affirmed.

The Supreme Court affirmed in part and reversed in part, holding that a prisoner

has no reasonable expectations of privacy in his prison cell. The Court reasoned that it would be impossible to accomplish the prison objectives of preventing the introduction of weapons, drugs, and other contraband into the premises if inmates retained a right of privacy in their cells. Hudson v. Palmer, 104 S. Ct. 3194 (1984), 21 CLB 69.

Court of Appeals, 5th Cir. A Louisiana state prisoner brought a Section 1983 action against various prison officials and guards, claiming that he had been denied due process in an administrative proceeding for alleged attempted theft, aggravated disobedience, and defiance that resulted in his commitment to extended lockdown. The district court dismissed the complaint, and the prisoner appealed.

The Court of Appeals for the Fifth Circuit affirmed, holding that the prisoner's complaint of a biased disciplinary tribunal did not allege violations of due process as long as the proceeding was conducted with apparent impartiality and the prisoner was afforded an opportunity to clear himself of misdeeds he did not commit. The court further found that the allegation that a biased high-ranking officer of the prison sat in on the prisoner's disciplinary case only to punish him for "beating" earlier, unrelated charges in a prior proceeding did not in itself allege a violation of due process unless the state procedures for redress of alleged improper proceedings were constitutionally inadequate. Collins v. King, 743 F.2d 248 (1984), 21 CLB 180.

§ 41.40 Access to legal assistance and courts

U.S. Supreme Court Four inmates of a federal prison were placed in administrative segregation during an investigation of the murder of a fellow inmate. They remained in individual cells for nineteen months before they were indicted and arraigned in the district court, at which time counsel was appointed for them. The district court denied their motion to dismiss the indictment, and they were convicted of murder, but the court of appeals reversed.

The Supreme Court reversed and remanded, holding that federal inmates are not entitled to the appointment of counsel while they are in administrative segregation and before any adversary judicial proceedings are initiated against them. The Court noted that the Sixth Amendment right to counsel attaches only when there is a criminal prosecution so that the accused may be aided at all critical pretrial proceedings and when the accused is confronted with the intricacies of the criminal law at trial. United States v. Gouveia, 104 S. Ct. 2292 (1984), 21 CLB 72.

42. ANCILLARY PROCEEDINGS

DEPRIVATION OF CIVIL RIGHTS

§ 42.30 In general

U.S. Supreme Court The father of a burglar who was shot while fleeing from an unoccupied house brought a wrongful death action under the federal civil rights statute against the officer who fired the shot. The district court ruled for the officer, and the court of appeals reversed.

The Supreme Court affirmed, holding that the use of deadly force to prevent the escape of a felony suspect, whatever the circumstances, is constitutionally unreasonable. The Court observed that the Fourth Amendment should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. The Court further observed that the police had no reason to believe that the suspect—young, slight and unarmed—posed any threat or was dangerous. Tennessee v. Garner, 105 S. Ct. 1694 (1985), 21 CLB 462.

U.S. Supreme Court After respondents were arrested for nonjailable misdemeanors, the magistrate in a Virginia county imposed bail, which respondents were unable to meet. The magistrate committed them to jail, and they brought an action under Section 1983, claiming that the magistrate's action was unconstitutional. The district court agreed and enjoined the practice, and it also awarded respondents costs and attorneys' fees. The court of appeals affirmed.

The Supreme Court affirmed, holding that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in a judicial capacity; nor is it a bar to an award of attorneys' fees under Section 1983. Pulliam v. Allen, 104 S. Ct. 1970 (1984), 21 CLB 71.

Court of Appeals, 1st Cir. In a civil rights action brought by a prison inmate against corrections officers alleging that they had beaten him while he was housed in a

segregation unit, the district court entered a judgment for the corrections officers.

The Court of Appeals for the First Circuit reversed and remanded for a new trial, holding that in a civil rights action it is prejudicial error to admit the past disciplinary record of the inmate to show that he was the aggressor. The court reasoned that, under Rule 404 of the Federal Rules of Evidence, prior bad acts may not be admitted to prove, in a case involving alleged violence, that plaintiff had a penchant for violent conduct. Lataille v. Ponte, 754 F.2d 33 (1985), 21 CLB 372.

JUVENILE DELINQUENTS AND YOUTHFUL OFFENDERS

§ 42.65 Juvenile delinquents

U.S. Supreme Court Under the New York Family Court Act, pretrial detention of accused juvenile delinquents is permitted based on a finding of "serious risk" that they may commit offenses before the return date. The petitioners brought a habeas corpus action alleging that the statute violated the due process clause. The district court struck down the statute, and the court of appeals affirmed.

The Supreme Court reversed, holding that the statute in question was not invalid under the due process clause. The Court explained that preventive detention under the statute serves a legitimate state objective of protecting both the juvenile and society from the hazards of pretrial crime, and that pretrial detention need not be considered punishment merely because a juvenile is subsequently discharged subject to conditions or put on probation. Schall v. Martin, 104 S. Ct. 2403 (1984), 21 CLB 74.

PART V—CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.55 General construction and operation of *Miranda*

U.S. Supreme Court After defendant was charged in New York state court with criminal possession of a weapon, the state trial judge excluded a statement made to a police officer about the location of the gun in the absence of *Miranda* warnings, and he also excluded subsequent statements as illegal fruits of the *Miranda* violation. The appellate division and the New York Court of Appeals affirmed.

The Supreme Court reversed and remanded, holding that defendant's initial statement indicating the whereabouts of a gun in the supermarket where defendant was apprehended and the gun itself were admissible despite the giving of *Miranda* warnings because of the "public safety" exception to the *Miranda* requirements. The Court reasoned that the doctrinal underpinnings of *Miranda* do not require that it be applied to a situation where police officers ask questions reasonably prompted by a concern for public safety. New York v. Quarles, 104 S. Ct. 2626 (1984), 21 CLB 77.

§ 43.75 Necessity and sufficiency of warnings

U.S. Supreme Court Defendant made an incriminating statement to police officers after having been questioned in his home as to a burglary without having been given any *Miranda* warnings. He was then taken to the station house and after having been given his *Miranda* warnings, defendant executed a written confession. The written confession was admitted at trial, and after his conviction, the Oregon Court of Appeals reversed.

The Supreme Court reversed, holding that the Fifth Amendment does not require the suppression of a confession made after proper *Miranda* warnings and a valid waiver solely because the police had obtained an earlier voluntary but unwarned admission fom the suspect. The Court observed that it is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective. Oregon v. Elstad, 105 S. Ct. 1285 (1985), 21 CLB 466.

Court of Appeals, 5th Cir. A Texas state prisoner convicted of capital murder in the course of a robbery sought federal habeas

corpus relief on the ground that the *Miranda* warnings given him at the time of arrest were inadequate. The district court denied the application, and the prisoner appealed.

The Court of Appeals for the Fifth Circuit affirmed the district court's denial of habeas relief, holding that the fact that a police officer stated that it would take "some time" before a lawyer would be appointed did not render the *Miranda* warnings inadequate. The court rejected the defense reasoning that the officer's comment linked the right to appointment of counsel to some future point after police interrogation, noting that the prisoner had also been informed that if he was too poor to hire a lawyer the court would appoint a lawyer for him free of charge "now or any other time." De La Rosa v. Texas, 743 F.2d 299 (1984), 21 CLB 181.

§ 43.85 Time of warning

New York Defendant was convicted of murder in the second degree and he appealed on the ground that his *Miranda* rights were violated. Defendant had invoked his right under *Miranda* to remain silent following arrest for a murder, which occurred during the course of a robbery. He later abandoned an attempt to speak to a district attorney when he was told that he first had to reveal to a detective what he wanted to talk about with the district attorney. The detective, instead of acceding to defendant's request, left and within a short time returned with furs stolen from the murder victim's apartment, and placed them directly in front of defendant's jail cell without giving further *Miranda* warnings. Thereupon, defendant made a further request to another detective to speak to a district attorney, followed, in one continuous conversation, by incriminating statements.

The majority of the court of appeals reversed the lower courts and found that the detectives improperly engaged in "interrogation" of a suspect, following the invocation of his right to silence, by placing some of the stolen items outside his jail cell without rereading him his *Miranda* rights. Therefore, defendant's right to cut off questioning was not scrupulously honored, and defendant's motion to suppress his statements made subsequent to his viewing of the furs was granted and a new trial ordered. People v. Ferro, 472 N.E.2d 13 (1984), 21 CLB 377.

§ 43.90 Waiver of *Miranda* rights

Georgia Defendant was convicted of murder, rape, burglary, forgery in the first degree, and financial transaction card fraud. He was sentenced to death for murder. Soon after his arrest, defendant was taken to police headquarters where an officer gave defendant the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Defendant thereupon signed a written waiver form reciting that he understood his *Miranda* rights, waived them, and was willing to make a statement. He gave an incriminating statement to police on this occasion and fifteen minutes later a second incriminating statement. Two days later, on September 4, defendant was brought before a county magistrate for a "first appearance" when he asked the magistrate to delay his committal hearings so that he would have time to retain an attorney, explaining that he did not wish to proceed with the public defender representing him. That afternoon, defendant gave a third incriminating statement that was tape recorded. Defendant later challenged admission of the third statement as violative of his Fifth and Sixth Amendment rights to counsel and therefore should have been suppressed.

The Georgia Supreme Court affirmed the conviction based on a close scrutiny of the facts. The court pointed out that at no time during police interrogation did he express any desire to deal with police only through counsel or request that interrogation cease for any reason. Instead, he announced only his intention to retain the services of an attorney to represent him at his committal hearing. Accordingly, the court decided that he waived any right to counsel he had under the Fifth Amendment, therefore, the court ruled that the admission into evidence of the resulting taped confession was not Fifth Amendment error. Turning to the Sixth Amendment, the court stated that the "first appearance" was not the type of adversarial judicial proceeding that triggers a defendant's Sixth Amendment right to an attorney. The purpose of the first appearance was simply to set a hearing date; it was not a "trial-type confrontation." Ross v. State, 326 S.E.2d 194 (1985), 21 CLB 472.

§ 43.105 —Effect of request for counsel

U.S. Supreme Court After defendant was arrested on armed robbery charges in Louisiana and read his *Miranda* rights, he said that he did not wish to make any statement until he saw a lawyer, and the interview was terminated. The next day, however, a detective again asked if he was willing to talk about the case, and after his *Miranda* rights were again read to him, defendant orally confessed to the robberies. The confession was admitted at trial and the defendant was convicted. While on appeal to the state supreme court, the Supreme Court ruled in Edwards v. Arizona, 451 U.S. 477 (1981), that a defendant's rights were violated by the use of a confession obtained without counsel present and after a request for an attorney. The Louisiana Supreme Court affirmed the conviction, and certiorari was granted.

The Supreme Court reversed, holding that the *Edwards* ruling applies to all cases pending on direct appeal at the time *Edwards* was decided. Shea v. Louisiana, 105 S. Ct. 1065 (1985), 21 CLB 464.

U.S. Supreme Court An Ohio state prisoner sought habeas corpus, which was granted by the district court, and the Court of Appeals for the Sixth Circuit affirmed.

On petition for a stay, Justice O'Connor held that the grant of the writ would be stayed in view of the doubtfulness of the underlying decision that the use at the prisoner's trial of statements that he made, after he had invoked his rights to silence and to the presence of an attorney, would require the grant of a new trial. The court reasoned that Edwards v. Arizona, 451 U.S. 477 (1981), should not retroactively render inadmissible a statement such as that presented here, which was obtained by the police years before *Edwards* was decided. Tate v. Rose, 104 S. Ct. 2186 (1984), 21 CLB 71.

44. CONFRONTATION OF WITNESSES

§ 44.00 In general

§ 44.05 —Interpretation by state courts

Washington Defendant was convicted of indecent liberties involving four- and five-year-old victims in a trial where hearsay statements of the two alleged victims were admitted under a state statute that conditionally admits hearsay statements of child victims of sexual abuse. At trial the parties stipulated that the children were incompetent to testify. The judge allowed their mothers to testify under the statute as to claims the boys had made regarding their sexual contact with defendant. On appeal, the following question was certified: whether the statute violates the confrontation clause of the state and federal constitutions.

The majority of the Washington Supreme Court, en banc, decided that inasmuch as age alone does not render a witness incompetent, the children could not be properly declared "unavailable" absent a hearing to determine whether they were incapable of perceiving or relating the facts of the incidents at issue. The trial court also erred when it based its finding that the statements were reliable on the fact that defendant subsequently confessed: "Adequate indicia of reliability must be found in the reference to circumstances surrounding the making of the statement, and not from subsequent corroboration of the criminal act." The court held, therefore, that defendant was denied his Sixth Amendment confrontation rights when the trial judge admitted the hearsay statements of the two boys without determining whether the children were actually incompetent or whether their claims possessed sufficient indicia of reliability. State v. Ryan, 691 P.2d 197 (1984), 21 CLB 376.

§ 44.15 Co-defendant's out-of-court statements

North Carolina Defendant was charged with armed robbery, larceny of a firearm, and carrying a concealed weapon. Defendant's case was consolidated for trial with the cases of co-defendants, Gonzalez and Crawford, who also were charged with the armed robbery of the same store that defendant had been charged with robbing. A jury found defendant guilty of armed robbery and carrying a concealed weapon. Co-defendant Gonzalez was convicted as charged. Co-defendant Crawford was acquitted. Defendant was convicted and sentenced. The court of appeals affirmed defendant's convictions, and defendant petitioned for discretionary review which was granted. Defendant contended that he was deprived of his right to a fair trial by

the consolidation of his trial with the trial of defendants Gonzalez and Crawford, and the resulting admission of the expurgated extrajudicial statements of defendants Gonzalez and Crawford without a limiting instruction. Thus, defendant was denied his Sixth Amendment right to confront the witnesses against him by the trial court's erroneous admission of the aforementioned extrajudicial statements.

The North Carolina Supreme Court reversed and remanded the case and found that the following statement by Crawford incriminated defendant: "I told him I was with some guys, but that I didn't rob anyone, they did." The court concluded that the introduction of this extrajudicial statement constituted error, and violated the decision reached in Bruton v. United States, 391 U.S. 123 (1968). *Bruton* holds that even with a cautionary instruction, a confession by a nontestifying defendant cannot be placed before a jury if it implicates a jointly tried defendant. In brief, defendant was denied his right of cross-examination secured by the confrontation clause of the Sixth Amendment. The court held that the above statement of co-defendant Crawford clearly implicated defendant, even though it was sanitized, and its admission into evidence was not harmless error. Therefore, defendant was entitled to a new trial. State v. Gonzalez, 316 S.E.2d 229 (1984), 21 CLB 84.

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.05 Right of indigent defendant

Alaska A private attorney was appointed by the state court to represent an indigent defendant charged with committing nine offenses. Since both the public defender and a law firm retained to handle indigent cases experienced conflicts of interest, the matter was assigned to the attorney. The attorney's name was taken from a list compiled pursuant to a 1979 court order and based on the Anchorage phone book. The same court order also directed that if an attorney could not accept a court appointment, he or she was responsible for arranging "for another attorney to provide such representation." The attorney objected to the order, arguing that it required private attorneys to provide services to persons they would rather not represent. In addition, he claimed that the order required attorneys, like himself, not competent in criminal matters to represent criminal defendants.

The majority of the Alaska Supreme Court, after reviewing this attorney's credentials, found that he was competent in criminal law and should have accepted the court assignment. However, the court reversed a contempt judgment entered against him on the ground that he was denied a jury trial. However, the provision of the 1979 court order forcing attorneys who cannot ethically accept an appointment to hire and pay for a replacement was held unconstitutional as taking an attorney's property without just compensation. Wood v. Superior Ct., 690 P.2d 1225 (1984), 21 CLB 377.

§ 45.25 Waiver

U.S. Supreme Court After defendant was convicted of armed robbery in Illinous state court and the Illinois Supreme Court affirmed, defendant petitioned for a writ of certiorari on the ground that the trial court had improperly admitted statements made by him after he expressed a desire to deal with the police only through counsel.

The Supreme Court reversed and remanded, holding that once an accused in custody has expressed a desire to be represented by counsel, he should not be subjected to further questioning until counsel has been made available to him or unless he validly waives his earlier request to be represented by counsel. The Court commented that a valid waiver cannot be established by showing only that the accused responded to further police-initiated custodial interrogation, and that a subsequent statement by him may not be used to cast retrospective doubt in his initial request. Smith v. Illinois, 105 S. Ct. 490 (1984), 21 CLB 256.

U.S. Supreme Court An Iowa prisoner convicted of first-degree murder sought habeas corpus relief on the ground that evidence had been improperly admitted against him at trial. The district court denied relief, and the Court of Appeals for the Eighth Circuit reversed and remanded.

The Supreme Court reversed and remanded, holding that the inevitable dis-

covery rule should be adopted. The Court thus found that although the police had improperly questioned the defendant after his arraignment and elicited incriminating statements, the body of the victim would inevitably have been discovered with the aid of the 200 volunteers systematically searching the area even without the defendant's admissions. The Court further decided that the prosecution need only establish this exception by a preponderance of the evidence. Nix v. Williams, 104 S. Ct. 2501 (1984), 21 CLB 71.

TYPE OR STAGE OF PROCEEDING

§ 45.45 Arraignment and preliminary hearing

Court of Appeals, 2d Cir. After three individuals committed an armed robbery at a garage, during which an employee was shot and killed, defendant voluntarily surrendered. After receiving *Miranda* warnings, he stated that he had been at the garage at the time of the robbery but was not personally involved. He was then sent to the Bronx House of Detention following his arraignment, and was moved to a cell where an informant had been instructed to find out the identity of the defendant's accomplices. Defendant told the informant that he and two cohorts had executed the robbery according to plan, and the informant passed the information on to the police. Defendant was convicted, and his petition for habeas corpus relief was denied in the district court.

The Court of Appeals for the Second Circuit reversed the conviction, holding that the state's use of a jailhouse informant placed in the defendant's cell by prearrangement to elicit inculpatory information violated petitioner's right to counsel. The court reasoned that since the government intentionally staged the scene that induced defendant to make the inculpatory statements, it could be deemed to have deliberately elicited them in violation of defendant's Sixth Amendment right to counsel. Wilson v. Henderson, 742 F.2d 741 (1984), 21 CLB 178.

Maine Defendant was convicted of two degrees of theft as well as burglary. A co-defendant and other witnesses had received telephone threats, and defendant had revealed to the co-defendant a plan to kill one of the witnesses. The co-defendant turned informer and, wearing a body wire transmitter, met with defendant after being instructed to avoid drawing information out of him. Defendant's incriminating statements concerning the pending indictment were offered against him at trial.

The Maine Supreme Judicial Court stated that the situation was controlled by United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980), which instructs that the rule of Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964), applies whenever the state intentionally creates a situation likely to induce a defendant to make incriminating statements. The court held that the instruction to avoid actively questioning defendant was not a sufficient protection for defendant's Sixth Amendment right to counsel. The authorities should have known that the close relationship between the informer and defendant significantly increased the chance that defendant would confide incriminating information to the informer. The state's valid purpose in investigating other criminal activity cannot remove from constitutional scrutiny evidence thereby uncovered that relates to alleged criminal acts for which the right to counsel has already attached. State v. Moulton, 481 A.2d 155 (1984), 21 CLB 268.

§ 45.60 Sentencing

U.S. Supreme Court After respondent pleaded guilty in Florida state court to three capital murder charges, respondent told the judge that he had no significant prior criminal record and that he was under "extreme stress." Prior to sentencing, counsel decided not to ask for a presentence or psychiatric report, instead relying on the statements made at the time of plea. After the Florida Supreme Court affirmed, the respondent sought habeas corpus relief in the district court, which was denied, but the court of appeals reversed and remanded.

The Supreme Court reversed, holding that a finding of ineffective assistance of counsel cannot be made unless counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied upon to produce a just result. The Court further observed that, for a showing of prejudice, the defendant must show that there is a reasonable probability that, but for counsel's un-

professional errors, the result of the proceeding would have been different. Strickland v. Washington, 104 S. Ct. 2052 (1984), 21 CLB 71.

§ 45.85 Appeals

U.S. Supreme Court After defendant was convicted of a drug offense in Kentucky state court, his retained counsel filed a notice of appeal, but the appeal was dismissed because counsel failed to file a statement of appeal. When the Kentucky Supreme Court affirmed, defendant was granted habeas corpus relief in the district court, and the court of appeals affirmed.

The Supreme Court affirmed, holding that the due process clause guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. The Court reasoned that a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. Evitts v. Lucey, 105 S. Ct. 830 (1985), 21 CLB 370.

U.S. Supreme Court After defendant was convicted in the district court of mail fraud involving a "check kiting" scheme, he appealed on the ground that his counsel had not provided effective assistance, and the Court of Appeals for the Tenth Circuit reversed. Trial counsel, who was young and inexperienced in criminal matters, was given only twenty-five days to prepare for trial, and some of the witnesses were not readily accessible.

The Supreme Court reversed and remanded, holding that the court of appeals had improperly applied a standard of reasonable competence without finding that there had been an actual breakdown of the adversarial process during the trial. The Court thus found that the criteria identified by the court of appeals as the circumstances surrounding the defendant's representation, while relevant to an evaluation of a lawyer's effectiveness in a particular case, did not provide an adequate basis for concluding that competent counsel was unable to protect the defendant's constitutional rights. The Court further noted that if there is no bona fide defense to a charge, counsel cannot create one and may render a disservice to the interests of his client by attempting a useless charade. United States v. Cronic, 104 S. Ct. 2039 (1984), 21 CLB 67.

NATURE OF OFFENSE CHARGED

§ 45.95 Traffic and ordinance violations

Kansas In a prosecution for driving under the influence of alcohol, the trial court suppressed the results from the breath test given driver defendant. Defendant was stopped and arrested for DUI by a highway patrol trooper. Defendant was informed of his *Miranda* rights while at the arrest site. After defendant arrived at the local police station, the officer requested defendant to take a breath test. Defendant asked to be allowed to telephone his attorney before deciding whether to take the test. The officer refused, and defendant consented to the test. After providing the breath sample, he was allowed to call his lawyer. Defendant filed a pretrial motion to suppress the test results. After conducting a hearing, the trial court ordered the results of the test suppressed on the ground that defendant's consent to the test was obtained in violation of his Sixth Amendment right to counsel. The state appealed.

A majority of the Kansas Supreme Court stated that the Sixth Amendment right to counsel applies only to criminal cases. Therefore, adversarial judicial criminal proceedings must have been initiated before the constitutional right to counsel attaches. An arrest for DUI does not, in itself, initiate the criminal proceeding. It is the filing of a complaint that triggers the initiation of the criminal proceedings, and under Kansas law a traffic ticket does not become a complaint until it is filed with the court. Therefore, defendant had no constitutional right to consult with counsel in order to determine whether to submit to a breath test. The court recognized that when a DUI arrestee receives *Miranda* warnings, he may become confused regarding the scope of the right to counsel set forth in the warnings. In order to avoid confusion, therefore, an arrestee should be informed that he has no right to counsel before deciding whether to take the test. State v. Bristor, 691 P.2d 1 (1984), 21 CLB 374.

Maryland Defendant was convicted of driving while intoxicated. Defendant was stopped by police for drunk driving. The arresting officer read defendant a standardized statement of his rights and the penalties for refusal to submit to a chemi-

cal test under the state's implied consent statute. Defendant agreed to take a chemical sobriety test and signed the required waiver form. According to defendant, he requested permission to telephone his attorney three times both before and after the test was administered, but the officer said he had no right to counsel. Defendant moved to suppress the test results on the ground that he was denied his right to counsel under the Sixth Amendment prior to administration of the breathalyzer test. The trial court denied his motion, and he appealed.

The court of appeals held that the due process clause of the Fourteenth Amendment, as well as Article 24 of the Maryland Declaration of Rights, requires that a person under detention for drunk driving must, on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process. On the way to this result, the court rejected the argument that the pretest period is a "critical stage" of a drunken driving prosecution, so as to trigger an arrestee's Sixth Amendment right to counsel. The court indicated, however, that the due process clause of the Fourteenth Amendment "has long been recognized as a source of a right to counsel independent of the Sixth Amendment where critically important to the fairness of the proceeding." With respect to the question of what happens when an arrestee submits to a test after being denied his due process right to contact an attorney, the court concluded that the only effective sanction is to suppress the test results. Sites v. State, 481 A.2d 192 (1984), 21 CLB 380.

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.110 Ineffectiveness

§ 45.115 —Interpretations by state courts

Arizona Defendant was convicted of aggravated robbery and sentenced to twenty years' imprisonment. He appealed his conviction. The primary question on appeal was whether trial counsel's acquiescence in defendant's demand that he call witnesses whose veracity and credibility counsel strongly doubted and the concomitant waiving of closing argument constituted ineffective assistance of counsel under the Sixth Amendment.

The Arizona Supreme Court, en banc, found that in acceding to defendant's demand that he call the witnesses and in failing to present a closing argument, trial counsel provided less than minimally competent representation. The counsel's decision not to present a closing argument was not ineffective assistance per se, however, counsel's choice whether based on ethics or tactics was unreasonable. No ethical principle would have barred counsel from making an argument based on evidence and testimony other than that of the perjurious witnesses and, as a tactical matter, such an argument was possible in this case. State v. Lee, 689 P.2d 153 (1984), 21 CLB 380.

Arkansas Defendant was found guilty of rape and was sentenced to prison. He petitioned for postconviction relief on the ground that he was not afforded effective assistance of counsel at trial because his counsel failed to challenge a juror, make timely objection to the testimony of a police officer, and have defendant testify on his own behalf.

The Arkansas Supreme Court held that defendant had not proven that he was prejudiced by counsel's representation. To prevail on an allegation of ineffective assistance of counsel, the court stated, defendant must establish that the conduct of counsel prejudiced him so as to undermine the adversarial process citing Strickland v. Washington, 104 S. Ct. 2052 (1984). The court observed that the object of a review of a claim of ineffective assistance of counsel is not to grade counsel's performance but to find actual prejudice. Neither mere error on the part of counsel nor bad advice is tantamount to denial of effective assistance of counsel under the Sixth Amendment. Isom v. State, 682 S.W.2d 755 (1985), 21 CLB 379.

§ 45.120 —Failure to assert available defense

Court of Appeals, 2d Cir. After defendant pleaded guilty in New York State court to

first-degree robbery and other offenses, he appealed on the ground that he was denied effective assistance of counsel. After having exhausted his state remedies, he filed a habeas corpus petition, which was denied by the district court.

The Court of Appeals for the Second Circuit affirmed the district court's denial of the petition, holding that the trial counsel's failure to advise defendant of the affirmative "play pistol" defense to the first-degree robbery charge did not deny him effective assistance of counsel. The court reasoned that there was little likelihood that the defense would succeed because defendant would have been forced to take the witness stand in order to try to establish it, and he would have had to concede the burglary and the robbery in order to present the "play pistol" claim to the jury. Mitchell v. Scully, 746 F.2d 951 (1984), 21 CLB 258.

§ 45.135 —Failure of trial counsel to protect client's appellate rights

U.S. Supreme Court Defendant was convicted in 1969 of first-degree murder in North Carolina state court and sentenced to life imprisonment. At trial, the judge instructed the jury that defendant had the burden of proving lack of malice. In 1975, Mullaney v. Wilbur, 421 U.S. 684, struck down the requirement that the defendant bear the burden of proving lack of malice. Defendant's habeas corpus proceeding was barred by the district court for failing to raise the issue on direct appeal, and the court of appeals affirmed. The Supreme Court vacated and remanded for further proceedings. On remand, the court of appeals reversed, holding that the defendant had shown "cause and actual prejudice" permitting habeas corpus relief because the *Mullaney* issue was so novel at the time of his state appeal that his attorney could not reasonably be expected to have raised it.

The Supreme Court affirmed, holding that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. Reed v. Ross, 104 S. Ct. 2901 (1984), 21 CLB 75.

RIGHT TO CONFER WITH COUNSEL

§ 45.165 In general

§ 45.166 —Interpretations by state courts

New York Defendant was convicted of second-degree murder and burglary. Police went to the home of defendant when the victim's husband recognized defendant's voice during a telephone call demanding ransom. After being advised of his *Miranda* rights, defendant refused the services of a lawyer and indicated he might know something. When he attempted to drive away, however, he was taken to the police station where he asked for a lawyer. But when he told the lawyer that he could not pay him unless he was able to get ransom money from the victim's father, the lawyer departed, recommending that defendant call Legal Aid. However, defendant did not make the call insisting that he would act as his own attorney. Faced with defendant's refusal to provide any indication as to the whereabouts of the victim until he was paid ransom money, the police continued to question him. Later, defendant led police to the victim, who had suffocated in a coffin-like box. On appeal from his conviction, defendant claimed his incriminating statements, including his continued demands for ransom money in exchange for information, should be suppressed as violative of his right to counsel under the New York State Constitution.

The court of appeals found that it would not be reasonable or realistic to expect the police to refrain from pursuing the most obvious, and perhaps the only, source of information by questioning the kidnapper, simply because the kidnapper asserted the right to counsel after being taken into custody. For the court to hold that the special restrictions of the state right-to-counsel rule extend into this area of police activity would either dangerously limit the power of the police to find and possibly rescue the victim, or would, perversely, permit the kidnapper to continue his ransom demands and negotiations from the sanctuary of the police station. Therefore, the court held that the police did not violate defendant's right to counsel under the state constitution by questioning him concerning the victim's whereabouts. People v. Krom, 461 N.E.2d 276 (1984), 21 CLB 79.

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.00 In general

§ 46.01 —Interpretations by state courts

Arizona Defendant and his brothers, sons of an inmate, helped their father and another inmate escape from state prison. The weapons used in the escape and during the subsequent twelve-day flight were provided by the three brothers. They assisted in planning the breakout, procured a car, and held guns on guards during the escape. They were also aware that their father had killed a guard during an earlier escape attempt. Thus, they could anticipate the use of lethal force during this attempt to flee confinement. The four killings for which defendant and his brothers were convicted occurred later when the escapees and their helpers were stranded because of car trouble. When four people in a passing car stopped to render aid, the gang killed the four and took their car. The gang was apprehended later by police. On appeal, defendant argued that imposition of the death penalty in this case was unconstitutional under Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982), where the Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty absent a showing that the defendant killed, attempted to kill, or intended to kill.

The Arizona Supreme Court concluded from the facts that defendant intended to kill. Defendant's participation up to the moment of the firing of the fatal shots was substantially the same as the others. Defendant actively participated in the events leading to death by, among other things, providing the murder weapons and helping abduct the victims. Moreover, defendant was present at the murder site, did nothing to interfere with the murders, and after the murders even continued on the joint venture. State v. Tison, 690 P.2d 755 (1984), 21 CLB 264.

§ 46.05 Death penalty

§ 46.10 —Statutory requirements

Florida Defendant was convicted of first-degree murder for having shot a man in the back, twice, during the course of a robbery. In spite of the jury's recommendation of life imprisonment, the trial judge imposed the death penalty, based on his finding of four aggravating circumstances: The crime was committed while defendant was under sentence of imprisonment; it took place during the commission of a felony; it was especially heinous, atrocious, and cruel; and it was cold, calculated, and premeditated.

On appeal, the Florida Supreme Court upheld the death sentence. It found that the killing of a victim who apparently offered no resistance to the robbery was not especially heinous, atrocious, and cruel, since there was nothing about it to "set the crime apart from the norm of capital felonies." It also rejected the trial judge's finding that the killing was cold, calculated, and premeditated, since that aggravating factor "applies only to crimes which exhibit a heightened premeditation, greater than that required to establish premeditated murder." It noted that the trial judge erred in citing the defendant's lack of remorse in support of the latter finding; consideration of lack of remorse is improper in making findings in support of aggravating factors. Faced, however, with the two remaining aggravating factors and no mitigating factors, the Florida Supreme Court concluded that the facts clearly and convincingly suggested a sentence of death, making the jury override appropriate. Gorham v. State, 454 So. 2d 556 (1984), 21 CLB 183.

§ 46.11 —State constitutional requirements

Massachusetts A state trooper was found injured by multiple gunshot wounds and was taken to a nearby hospital where he died as a result of the wounds. Defendants were indicted for the trooper's murder, and after a series of hearings on pretrial motions in the Superior Court, the Commonwealth moved to report two questions of law because the judge found that each defendant, if convicted, might be sentenced to death. Therefore, the question of the constitutionality of the death penalty statute was so importaant as to require the decision of the Massachusetts Supreme Judicial Court on direct appellate review. In 1980, the high court had declared the capital punishment statute then in force to

be impermissibly cruel under the state constitution. In response, voters amended the constitution declaring that no state constitutional provision "shall be construed as prohibiting the imposition of the punishment of death," and the legislature enacted a new statute. The Commonwealth contended that the legislature intended for the trial judge to empanel a jury to decide the sentencing question after the court had accepted defendant's guilty plea.

The majority of the court interpreted the statute to require a jury verdict as a "condition precedent" to the imposition of the death penalty. The court found that the statutory sections referred to in the certified questions violated the state constitution by impermissibly burdening a defendant's right against self-incrimination and right to trial by jury. The majority asserted that the constitutional amendment passed by the voters takes away only the court's power to prohibit the death penalty entirely; however, the court may continue to review particular statutes providing for death sentences. Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (1984), 21 CLB 262.

47. DOUBLE JEOPARDY

§ 47.10 When jeopardy attaches

U.S. Supreme Court Under Massachusetts's two-tier system, if a defendant charged with certain minor crimes elects to have a bench trial and is dissatisfied with the results, he has an absolute right to trial de novo before a jury and need not allege error at the bench trial, but he has no right to appellate review of a bench trial conviction. After conviction at a bench trial, however, defendant moved to dismiss the charge on the ground that since no evidence of intent had been presented at the trial, retrial was barred. The motion to dismiss was denied and the dismissal was affirmed by the Massachusetts Supreme Judicial Court. The district court, however, granted habeas corpus relief and the court of appeals affirmed.

The Supreme Court reversed, holding that defendant's retrial de novo without any judicial determination of the sufficiency of the evidence at his prior bench trial did not violate the double jeopardy clause. The Court reasoned that the state was not intending to impose multiple punishments for a single offense by the two-tier system since the defendant had not been acquitted. Justices of Boston Mun. Ct. v. Lydon, 104 S. Ct. 1805 (1984), 21 CLB 73.

§ 47.15 —Interpretations by state courts

Tennessee Defendant was indicted for vehicular homicide after he pleaded guilty to and was sentenced in municipal court for driving while under the influence of an intoxicant, disregarding a stop sign, and unlawful possession of a controlled substance. Defendant moved to dismiss the indictment on the ground that the second prosecution violated the double jeopardy provisions of the federal and state constitutions. The motion was denied. On appeal, the issue before the court was whether the double jeopardy clauses of the state and federal constitutions bar a prosecution for vehicular homicide when defendant, prior to the victim's death, had pleaded guilty to and been sentenced in municipal court for the three specified charges.

The Tennessee Supreme Court stated that the double jeopardy provisions of the Fifth Amendment and the state constitution prohibit the federal government or a state from trying a defendant for a greater offense after it has convicted him of a lesser included offense. The court added that an offense is necessarily included in another if the elements of the greater offense, as they are set forth in the indictment, include, but are not congruent with, all of the elements of the lesser. An exception to the prohibition occurs, and prosecution is allowed for the greater offense, when an element of the greater offense has not occurred at the time of the prosecution for the lesser offense. In the instant case, the court found that this defendant could not have been charged with vehicular homicide at the time of his trial in municipal court because a necessary element to prosecution for vehicular homicide (i.e., the death of the victim) had not yet occurred. Thus, defendant's indictment falls within the exception to the proscription against double jeopardy, and defendant may be prosecuted for vehicular homicide. State v. Mitchell, 682 S.W.2d 918 (1984), 21 CLB 381.

§ 47.20 Mistrials

U.S. Supreme Court After petitioner was indicted on three narcotics violation counts, the jury acquitted him on one count but was unable to agree on the others. The district court declared a mistrial and ordered a retrial. The petitioner's motion to bar a retrial was denied by the district court, and the court of appeals dismissed his appeal for lack of jurisdiction.

The Supreme Court reversed on the issue of jurisdiction, holding that while petitioner raised a colorable double jeopardy claim that was appealable, petitioner had no valid double jeopardy claim since neither the failure of the jury to reach a verdict nor the declaration of mistrial is an event that terminates the original jeopardy. Richardson v. United States, 104 S. Ct. 3081 (1984), 21 CLB 67.

§ 47.40 Implied acquittal

U.S. Supreme Court After defendant was indicted for murder, involuntary manslaughter, aggravated robbery, and grand theft, he pleaded guilty at arraignment to involuntary manslaughter and grand theft. Over the state's objection, the court dismissed the remaining charges to which he had pleaded not guilty. The Ohio Court of Appeals and the Ohio Supreme Court affirmed.

The Supreme Court reversed and remanded, holding that the double jeopardy clause does not prohibit the state from continuing its prosecution of respondent on murder and aggravated robbery charges after a guilty plea on another count. The Court explained that acceptance of a guilty plea on a lesser included offense while charges on the greater offenses remain pending is not the same as an implied acquittal that results from a guilty verdict on lesser included offenses rendered by a jury. Ohio v. Johnson, 104 S. Ct. 2536 (1984), 21 CLB 70.

§ 47.45 Separate and distinct offenses

U.S. Supreme Court After defendant was convicted in the district court for currency reporting and false statement offenses, he received a sentence of six months in prison on the false statement count and a consecutive three-year term of probation on the currency reporting count. The answer "no" to the question on a Customs form of whether he was carrying more than $5,000 into the country formed the basis for each count. The Court of Appeals for the Ninth Circuit reversed the false statement conviction (18 U.S.C. § 1001), finding that defendant's conduct could not be punished under the false statement and currency reporting (31 U.S.C. §§ 1058, 1101) statutes.

The Supreme Court reversed, holding that since proof of currency reporting violation does not necessarily include proof of a false statement offense, a defendant could properly be convicted of, and receive consecutive punishments for, the two offenses without constituting double jeopardy. United States v. Woodward, 105 S. Ct. 611 (1985), 21 CLB 369.

§ 47.50 —Same transaction

U.S. Supreme Court After defendant was arrested when the police found him in possession of another person's revolver, he was indicted and convicted under two different statutes on charges of receiving a firearm and for possessing it. He was then sentenced to consecutive terms of imprisonment on the respective counts. The district court denied his motion for a change of sentence, and the court of appeals reversed.

The Supreme Court vacated and remanded, holding that while the government may seek a multiple-count indictment where a single act establishes both the receipt and possession of the firearm, the defendant may not suffer two convictions or sentences on such an indictment. Ball v. United States, 105 S. Ct. 1668 (1985), 21 CLB 462.

§ 47.55 Administrative proceedings

U.S. Supreme Court Certain prison inmates who were convicted of capital offenses and sentenced to death by lethal injection of drugs petitioned the Food and Drug Administration (FDA), alleging that the use of the drugs for such a purpose violated the federal Food, Drug, and Cosmetic Act (FDCA). When the FDA refused their petition, the action in the district court was denied, but the court of appeals reversed, holding that the FDA's refusal to take enforcement action was re-

viewable and such refusal was an abuse of discretion.

The Supreme Court reversed, holding that the FDA's decision not to take the enforcement actions requested was not subject to review under the Administrative Procedure Act (APA). The Court reasoned that the presumption that an agency decision not to institute enforcement proceedings is unreviewable was not rebutted here, especially since the relevant provisions give complete discretion to the FDA and the Secretary of Health and Human Services to decide how and when they should be exercised. Heckler v. Chaney, 105 S. Ct. 1649 (1985), 21 CLB 463.

48. DUE PROCESS

§ 48.00 In general

U.S. Supreme Court After motions to suppress evidence obtained from breath analysis tests were denied in various California state court cases, the California Court of Appeals granted new trials and ordered that the test results not be admitted as evidence.

The Supreme Court reversed and remanded, holding that the due process clause does not require that law enforcement agencies preserve breath analysis samples of suspected drunk drivers in order for the test results to be admissible in criminal prosecutions. The Court reasoned that the evidence to be presented at trial was not the breath itself but rather the test results obtained from the samples. California v. Trombetta, 104 S. Ct. 2528 (1984), 21 CLB 70.

U.S. Supreme Court Following an accident where a passenger in a truck was killed, the driver of the other vehicle was charged with reckless driving and three other misdemeanors. Upon being convicted in Mississippi state court, he appealed. While the appeal was pending, he was indicted for manslaughter based on the same accident, and was convicted. The Mississippi Supreme Court affirmed, but the district court granted his habeas corpus petition and the court of appeals affirmed.

The Supreme Court affirmed, holding that the prosecution of respondent for manslaughter during his appeal on the misdemeanor convictions was unconstitutional as a violation of due process. The Court observed that the fact that the misdemeanor charges were brought by the county prosecutor, whereas the felony indictment was obtained by the district attorney, did not change the presumption of vindictiveness arising from the obtaining of the indictment. Thigpen v. Roberts, 104 S. Ct. 2916 (1984), 21 CLB 69.

Court of Appeals, 2d Cir. After a corporation and its vice-president were convicted of making false representations and statements to the Department of Agriculture, they appealed on the ground that the judge's reversal of a prior ruling had deprived them of a fair trial.

The Court of Appeals for the Second Circuit vacated in part and remanded for a new trial, holding that the vice-president was deprived of a fair trial when the trial judge indicated that he would disregard certain testimony of a government witness and then changed his mind. The court reasoned that if the trial court elects to announce credibility determinations in the midst of trial, defense counsel cannot be faulted for reliance on that determination in formulating its ensuing strategy. United States v. Mendel, 746 F.2d 155 (1984), 21 CLB 260.

§ 48.01 —Interpretations by state courts

South Dakota A South Dakota statute permits a person suspected of driving while intoxicated to refuse to submit to a blood-alcohol test, but authorizes revocation of the driver's license of a person so refusing the test and permits such refusal to be used against him at trial. When defendant was arrested by police officers in South Dakota for driving while intoxicated, the officers asked him to submit to a blood-alcohol test and warned him that he could lose his license if he refused, but did not warn him that the refusal could be used against him at trial. The state supreme court affirmed the order of the trial court suppressing evidence of defendant's refusal on the ground that the statute, allowing introduction of evidence of the refusal, violated his Fifth Amendment privilege against self-incrimination. The U.S. Supreme Court granted certiorari and held that the admission into evidence of a defendant's refusal to submit to a blood-

alcohol test does not offend his right against self-incrimination.

On remand, the majority of the South Dakota Supreme Court again suppressed defendant's refusal to submit to a blood-alcohol test, this time on state due process grounds which "inherently" require a defendant to be fully informed of the consequences of a refusal to submit to such a test, namely, that his refusal could be used as evidence in a subsequent driving while intoxicated trial. The warnings in this instance dealt only with license revocation and *Miranda* warnings. Therefore, the court found that defendant did not voluntarily, knowingly, and intelligently waive his constitutional protection of due process and prohibition against self-incrimination. State v. Neville, 346 N.W.2d 425 (1984), 21 CLB 85.

§ 48.05 —Drug violations

Florida In a two-count indictment, defendants were charged with possessing cannabis and conspiring to traffic in more than 200 pounds of cannabis. Defendants filed motions to dismiss the information because of entrapment and prosecutorial misconduct. These motions relied primarily upon the agreement between the sheriff and a paid informer. Under the agreement, the informer was to receive 10 percent of all civil forfeitures arising out of successful narcotics investigations he completed in the county. The trial court dismissed the information after finding that prosecutorial misconduct in this case had deprived defendants of their right to due process under the Florida Constitution. The state appealed the affirmation of the trial court's holding, arguing that defendants' due process defense was both procedurally and substantively inapplicable in this case.

The Florida Supreme Court affirmed and pointed out that the informer "had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. . . . [He had] what amounts to a financial stake in criminal convictions." The court held, therefore, that a trial court "may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned upon cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution." State v. Glosson, 462 So. 2d 1082 (1985), 21 CLB 474.

51. FREEDOM OF THE PRESS

§ 51.00 In general

Court of Appeals, 3d Cir. Various newspapers and broadcast companies appealed from an order of the district court denying them permission to copy audiotapes admitted into evidence at the trial of seven former Philadelphia police officers. The district court also denied them access to transcripts of tape recordings that had been given to the jury.

The Court of Appeals for the Third Circuit reversed, holding that there is a strong presumption in favor of the common-law right of access to the audiotapes and even to the transcripts that had not been admitted into evidence. The court noted that access should not have been denied on the basis that it would jeopardize defendants' rights to a fair and impartial trial since the requested material was not lurid or inflammatory and had already been widely reported in the media. United States v. Martin, 746 F.2d 964 (1984), 21 CLB 259.

Court of Appeals, 4th Cir. The Knight Publishing Co. filed a writ of mandamus and prohibition contesting the actions of the district court in closing the courtroom to the public during the trial of North Carolina State Senator R.C. Soles, who was acquitted. The judge ordered the court closed to consider several motions filed by the defendant relating to alleged misconduct by the prosecutor.

The Court of Appeals for the Fourth Circuit denied the writ, but found that the district court had not given the press or others present notice and opportunity to object. The court further found that if the district court believed it necessary to close the courtroom after hearing objections, the findings should have been stated on the record, and they should have been specific enough to enable a reviewing court to determine whether the closure order was proper. However, the court found it unnecessary to issue a writ since it expressed its "confidence" that the district judges would follow these procedures in the future. *In re* Knight Pub. Co., 743 F.2d 231 (1984), 21 CLB 180.

California After the state supreme court denied a motion by a member of the news media to gain access to transcripts of preliminary hearings in a criminal prosecution, a mandamus proceeding was commenced by the news media to compel opening of the transcripts. The prosecution joined in the motion. Defendant, who was charged with the murder of twelve hospital patients by administering massive doses of a heart drug, opposed the motion, presenting evidence of the widespread publicity given to the case by the media. The trial judge found that "there is a reasonable likelihood that making all or part of the transcript public might prejudice the defendant's right to a fair and impartial trial," and ordered that the transcript remain sealed.

A majority of the California Supreme Court, en banc, held that the First Amendment right of access to trial proceedings does not extend to preliminary hearings. The court went on to distinguish two cases concerning access to trials, not preliminary hearings, by finding that the problem of potential prejudice to the defendant is substantially different. In 1982, the California legislature amended the automatic closure statute to make preliminary hearings presumptively open unless closure is "necessary" to protect a defendant's right to a fair and impartial trial. Faced with a dispute over how to determine whether closure is "necessary," the court declared that preliminary hearings may be closed if a defendant demonstrates a "reasonable likelihood of substantial prejudice" to the right to a fair trial. The closure statute makes clear, the court stated, that the primary right is to a fair trial and that the public's right of access must give way when there is a conflict. Press-Enterprise v. Superior Ct. (Diaz), 691 P.2d 1026 (1984), 21 CLB 373.

55. RIGHT TO JURY TRIAL

§ 55.00 In general

§ 55.01 —Interpretations by state courts

North Carolina Defendant was convicted of rape, kidnapping, and armed robbery and he appealed. Defendant contended that the trial judge's inquiry into the numerical division of the jury was reversible error because it tended to coerce a verdict. More specifically, defendant argued that asking the jury how it was divided numerically violated his right to due process of law and trial by jury under the federal Constitution as well as his right to trial by jury under the state Constitution.

The North Carolina Supreme Court affirmed, concluding that the U.S. Supreme Court ruling in Brasfield v. United States, 272 U.S. 448, 47 S. Ct. 135 (1926), was based on its supervisory power over the federal courts and therefore was not binding on the state court. The *Brasfield* case had held that the inquiry into the division of the jury was ground for reversal since said inquiries tended to be coercive. At most, the court stated, *Brasfield* sets out a rule of federal practice and is not binding on the courts of North Carolina. The court, therefore, held that a trial court's question on the division of the jury does not as a matter of law violate a defendant's right to due process of law and trial by jury under either the federal or North Carolina Constitutions. Nor, considering the totality of the circumstances, was the trial court's question concerning the division of the jury coercive and defendant was not prejudiced in any way. State v. Fowler, 322 S.E.2d 389 (1984), 21 CLB 264.

56. PROPRIETY OF EXERCISE OF POLICE POWER

§ 56.00 In general

Illinois Plaintiffs sought an injunction and a declaratory judgment that an ordinance of the village of Morton Grove banning the possession of all operable handguns violates the Illinois Constitution, Article 1 of Section 22, and is an unreasonable exercise of police power. The constitutional provision, ratified in 1970, states that "subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."

The majority of the Illinois Supreme Court employed a rational basis analysis to assess the validity of the ordinance under the police power. The preamble to the ordinance defines the village's interest as reducing "the potentiality of firearm related deaths and injuries." The majority found that the ordinance bore a rational relationship to this legitimate governmen-

tal interest; thus, it was a valid exercise of police power. The majority also noted that Article 1 of Section 22 is broader than its federal counterpart and gives individuals the affirmative right to bear arms of some kind, thereby putting a complete ban on firearms beyond the power of any legislative body. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (1984), 21 CLB 267.

58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 58.00 What constitutes a search

U.S. Supreme Court After a New Jersey high school teacher found the respondent smoking in a school lavatory in violation of a school rule, a search of respondent's purse uncovered evidence of her marijuana dealings. Thereafter, the state brought delinquency charges against the respondent, and the New Jersey Appellate Court affirmed the trial court's finding that there had been no Fourth Amendment violation. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse.

The Supreme Court reversed, holding that while the Fourth Amendment prohibits unreasonable searches conducted by public school officials, the search of the student's purse here was reasonable. The Court reasoned that the report that the respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse and, thus, the search was justified. New Jersey v. T.L.O., 105 S. Ct. 733 (1985), 21 CLB 370.

U.S. Supreme Court After a shopkeeper wounded an assailant who attempted to rob him, police officers found defendant, who was suffering from a gunshot wound to his left chest area. The victim identified defendant, and the Commonwealth of Virginia moved in state court for an order directing him to undergo surgery to remove a bullet lodged in his left collarbone. After the Virginia State Supreme Court denied defendant's petition for a writ of prohibition or habeas corpus, his action to enjoin the operation was eventually granted by the district court, and the court of appeals affirmed.

The Supreme Court affirmed, holding that the proposed surgery would violate defendant's right to be secure in his person, and the search would be "unreasonable" under the Fourth Amendment. The Court explained that such a compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion would be unreasonable even though likely to produce evidence of a crime. While finding that the reasonableness of surgical intrusions must be decided on a case-by-case basis, the Court based its ruling in this case on the need for a general anesthetic, which would involve a virtual total divestment of the patient's ordinary control, and the fact that the state had available substantial additional evidence against the defendant. Winston v. Lee, 105 S. Ct. 1611 (1985), 21 CLB 463.

U.S. Supreme Court After warrants were issued showing probable cause that illegal aliens were employed at a garment factory, Immigration (INS) agents conducted factory "surveys" of the work force in search of illegal aliens. Certain employees and their union filed an action alleging that the factory surveys violated their Fourth Amendment rights. The district court granted summary judgment for the INS, but the court of appeals reversed, holding that the surveys constituted a seizure of the entire work force.

The Supreme Court reversed, holding that the factory surveys did not result in the seizure of the entire work force, and the individual questioning of the employees by INS agents concerning their citizenship did not amount to a detention or seizure under the Fourth Amendment. The Court observed that interrogation relating to one's identity by the police does not, by itself, constitute a Fourth Amendment seizure unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. INS v. Delgado, 104 S. Ct. 1758 (1984), 21 CLB 76.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of various narcotics, firearm, and rack-

eteering offenses, they appealed on the ground, among other things, that a search warrant based on information gained from a trained dog was invalid.

The Court of Appeals for the Second Circuit affirmed, holding that although the search warrant was not based on probable cause, the officers' good-faith reliance on the warrant rendered the search valid. The court found that the use of a trained dog to sniff for narcotics outside defendant's apartment constituted a search that, when conducted without a warrant, violated the Fourth Amendment. United States v. Thomas, 757 F.2d 1359 (1985), 21 CLB 469.

Hawaii A member of the Drug Enforcement Agency (DEA) Task Force assigned to Honolulu International Airport brought his dog "Donker" to the Federal Express office at the airport. With the permission of Federal Express, the officer let Donker run loose in the package holding area. Donker stopped at a package addressed to Alan Snitkin and scratched it, signaling the possible presence of drugs. None of the humans present smelled contraband. Based solely on Donker's actions, the police obtained a search warrant, opened the package, and found cocaine. They then resealed the package, allowed Snitkin to pick it up, and arrested him. A grand jury indicted Snitkin for promoting a dangerous drug in the second degree. Defendant filed a motion to suppress the cocaine on the ground that Donker's actions constituted an illegal search. At the suppression hearing, the trial judge granted the motion. The state appealed his ruling.

The Hawaii Supreme Court reversed and held that use of a trained narcotics detection dog to sniff the airspace around a closed container is not a "search" under the Fourth Amendment or the Hawaii Constitution. Only the surrounding airspace was examined, not the package's contents. The court further held that the reasonableness of the dog's use in the particular circumstances should be determined by balancing the state's interest in using the dog against the individual's interest in freedom from unreasonable government intrusion. In view of the fact that one-fourth of the illegal drugs brought into Hawaii by air are transported by Federal Express, the government had a substantial interest in detecting drugs concealed in Federal Express packages. In contrast, defendant's interest in freedom from a narcotic dog's sniff of the airspace around his package was minimal. Therefore, the court concluded the state's use of the dog to sniff the package holding area was reasonable; however, a valid search warrant is still required to open private containers identified by a drug detection dog. State v. Snitkin, 681 P.2d 980 (1984), 21 CLB 86.

Washington Defendant was convicted of manufacture and possession of marijuana. A Sheriff Department's officer and a DEA agent viewed defendant's eighty acres of property from an altitude of 1,500 feet above ground level and identified marijuana on defendant's property. Based on this information, the officer obtained a warrant to search defendant's property but not the buildings. On completion of the search of the eighty acres, the officers had seized about 500 marijuana plants, and numerous bags and barrels of marijuana leaves and other evidence of marijuana cultivation. At trial, the court denied defendant's motion to suppress and admitted all evidence discovered on the property. On appeal, defendant contended that the overflight of his property was a search within the meaning of the Fourth Amendment as well as Article 1 of Section 7 of the Washington Constitution.

The Washington Supreme Court noted that the language of the Fourth Amendment and Article 1 of Section 7 differ significantly. The court added that the language of Article 1 of Section 7 precludes a "protected places" analysis as appears in the federal cases and mandates consideration of the protection of the person in his private affairs. Thus, the court focuses on those privacy interests that citizens of the state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. Here, defendant had planted several large marijuana gardens on his open property. His gardens were identifiable with the unaided eye from the lawful and nonintrusive altitude of 1,500 feet above ground level. For these reasons, the court found that the aerial surveillance of defendant's property was not a search under Article 1 of Section 7 of the Wash-

ington Constitution. State v. Myrick, 688 P.2d 151 (1984), 21 CLB 266.

§ 58.05 Constitutionally protected areas

Court of Appeals, 4th Cir. After defendant was convicted in the district court of possession of marijuana, he appealed on the ground that the police had improperly conducted a warrantless search of his property.

The Court of Appeals for the Fourth Circuit affirmed, holding that a warrantless, protective sweep of defendant's "curtilage" did not violate the Fourth Amendment. The court reasoned that the sweep was necessary for the officers' safety and, therefore, within the "exigent circumstances" exception to the warrant requirement. United States v. Bernard, 757 F.2d 1439 (1985), 21 CLB 468.

§ 58.10 Property subject to seizure

§ 58.15 —Plain view

U.S. Supreme Court In two similar prosecutions—one in Kentucky and the other in Maine—police bypassed "No Trespassing" signs and found marijuana patches on petitioners' property. The lower courts, however, suppressed the evidence on the grounds that the searches were unreasonable since petitioners had a reasonable expectation of privacy as to their fields. The Kentucky district court decision was reversed by the Court of Appeals for the Sixth Circuit, applying the principle that the Fourth Amendment does not apply to "open fields."

The Supreme Court affirmed the Sixth Circuit and reversed the decision of the Maine Supreme Judicial Court holding that the "open fields" doctrine was applicable to determine whether the discovery or seizure of the marijuana in question was valid. The Court reasoned that because open fields are accessible to the public and the police in ways that homes and offices are not, and because "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Oliver v. United States, 104 S. Ct. 1735 (1984), 21 CLB 74.

§ 58.20 —Abandonment

New Hampshire Defendant was charged with receiving stolen property and possession of a motor vehicle with knowledge that the identification number had been removed with the intent to conceal its identity. Defendant moved to suppress the evidence which was obtained as follows: A state title investigator and a state trooper went to an automotive repair shop based on information from an unidentified informant that a stolen Lincoln Continental could be found there. The investigator and the state trooper observed a Lincoln Continental at the shop and asked permission to check out the car, which was promptly granted. The confidential vehicle identification number (CVIN), it turned out, belonged to a Lincoln car reported stolen from a Massachusetts company. Based on these facts, a search warrant was issued by a local court. Upon executing the warrant, police seized the stolen Lincoln. Defendant moved to suppress all evidence seized by police pursuant to the warrant on the grounds that the evidence was seized illegally and in contravention of the Fourth Amendment and the New Hampshire Constitution. The state contended this was a valid administrative search conducted under a warrant and pursuant to statutory authority. The state further argued that under United States v. Salvucci, 448 U.S. 83 (1980), a defendant charged with a possessory offense lacked the legitimate or reasonable "expectation of privacy" in the vehicle necessary to confer on him standing to challenge an alleged search of the vehicle conducted in violation of his state and federal constitutional rights. The New Hampshire Supreme Court remanded the case and ruled that under the state constitution, a defendant need not establish, as required for standing under the federal Constitution, an "expectation of privacy" in the vehicle. The state constitutional provision guarantees that a citizen will be secure in all his possessions. Thus, the court stated that it "requires the 'automatic standing' be afforded to all persons with the State who are charged with crimes in which possession of an article or a thing is an element." State v. Sidebotham, 474 A.2d 1377 (1984), 21 CLB 82.

§ 58.25 —Exigent circumstances

U.S. Supreme Court The police went to the home of a suspect in a burglary-rape case to obtain his fingerprints. On being told that he would be arrested unless he accompanied the officers to the station-house, the defendant replied that he would rather go to the station than be arrested. He was then taken to the station and fingerprinted. When his fingerprints were found to match those taken at the scene of the crime, he was arrested and convicted. The Florida District Court of Appeals affirmed.

The Supreme Court reversed, holding that where there is no probable cause to arrest a defendant, no consent to the journey to the police station, and no warrant, the investigative detention at the station for fingerprinting purposes violates the Fourth Amendment, and any resulting fingerprints are the inadmissible fruits of an illegal detention. The Court reasoned that the forcible taking of a person from his home to a police station is sufficiently like an arrest as to require that it be done only on probable cause. Hayes v. Florida, 105 S. Ct. 1643 (1985), 21 CLB 462.

§ 58.30 —Automobile searches

U.S. Supreme Court After respondent was convicted of sexual battery, he appealed on the ground that evidence found in his car had been improperly seized. The car had been impounded at the time of his arrest, but the items in question were not seized until eight hours later when the car was searched. The Florida appellate courts reversed the conviction.

The Supreme Court reversed, holding that a warrantless search of an automobile impounded and in police custody eight hours after a valid initial search conducted at the time of the defendant's arrest was proper. The Court reasoned that justification of the initial warrantless search did not vanish once the car had been immobilized. Florida v. Meyers, 104 S. Ct. 1852 (1984), 21 CLB 73.

§ 58.40 —Border searches

U.S. Supreme Court Defendant was asked by police officers at Miami International Airport if he would step aside and talk with them, and he agreed. Eventually, after he agreed to the search of his luggage, three pounds of cocaine were found. The seized cocaine was suppressed by the Florida Trial Court, the Florida Appellate Court affirmed, and the Supreme Court granted certiorari.

The Supreme Court reversed the judgment and remanded for further proceedings, holding that the initial contact between the officers and defendant implicated no Fourth Amendment interest, and even assuming that there was a "seizure" of the contents of his luggage, such a seizure was justified by "articulable suspicion." The Court noted that defendant and his confederates had spoken "furtively" to one another and engaged in "strange movements" in an attempt to evade the officers. Florida v. Rodriguez, 105 S. Ct. 308 (1984), 21 CLB 254.

§ 58.43 —Inventory searches

Texas Criminal Appeals Defendant was convicted for possession of a controlled substance, fined, and sentenced to 101 days in jail. On appeal, defendant contended that the trial court erred in overruling his motion to suppress the fruits of a search of the glove compartment of his automobile. Defendant maintained that the search of his locked glove compartment was not justified under the guise of an "inventory search," and thus violated his constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment.

The majority of the Court of Criminal Appeals en banc concluded that the facts in the instant case are much like those in South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092 (1976), in which the Supreme Court said that the Fourth Amendment does not forbid police to conduct routine inventory searches, pursuant to standard procedures, of cars lawfully in their possession. The only significant difference in the facts in the instant case, the court observed, and those in *Opperman* are that defendant's car in *Opperman* was locked and the glove compartment was unlocked, whereas in the instant case the car was unlocked and the glove compartment was locked. The court did not find this difference to be of any great significance insofar as the reasonableness of the inventory search was concerned. The important similarity between the facts in *Opperman*

and the instant case was that the police had ready and free access to the automobile in both cases. The majority therefore held that the search conducted by the police was a lawful inventory search. Guillett v. State, 677 S.W.2d 46 (1984), 21 CLB 270.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75 Search warrant

§ 58.80 —Sufficiency of underlying affidavit

U.S. Supreme Court After defendant was convicted in Massachusetts Superior Court of burglary, receiving stolen property, and related crimes, he appealed on the ground that evidence had been improperly admitted against him at trial. The Massachusetts Supreme Court reversed and remanded.

The Supreme Court reversed, holding that under Illinois v. Gates, 103 S. Ct. 2317 (1983), the probable cause requirement for a search warrant should be decided upon the totality of the circumstances made known to the magistrate. The Court thus found that the Massachusetts court had misinterpreted *Gates* as merely refining or qualifying the "two-pronged test" of *Aguilar* and *Spinelli*, when in fact that test had been entirely discarded. In applying the proper test, the Court found that the affidavit, which relied on an informant's tip, was insufficient to establish probable cause. Massachusetts v. Upton, 104 S. Ct. 2085 (1984), 21 CLB 69.

§ 58.90 —Manner of execution

Court of Appeals, 5th Cir. After defendant was convicted in the district court of possession of cocaine with intent to distribute, he appealed on the ground that three pounds of cocaine found in a safe in his garage had been improperly seized.

The Court of Appeals for the Fifth Circuit affirmed the conviction, holding that under Texas state law, the search of the garage, which was enclosed along with the house by a single fence, was within the scope of a warrant authorizing the search of premises described as "a certain building, house or place" of the defendant. The court noted that Texas state courts have held search warrants with similar language to include doghouses, garages, and other buildings as much as fifty feet from houses. United States v. Moore, 743 F.2d 254 (1984), 21 CLB 180.

Arizona Defendant was convicted by a jury of sale of marijuana, unlawful possession of marijuana, and conspiracy and was suspected of being a "wholesaler" of marijuana. His house was under surveillance and police officers had been reliably informed that defendant had supplied marijuana to an individual they had just arrested. The officers were preparing an affidavit to obtain a telephone search warrant for defendant's home when they were called by one of the agents who had the house under surveillance and were told that defendant had just left in a pickup truck. The officer in charge ordered one detail of officers to stop the truck and another to "secure" the house until the warrant was obtained. This was done. The telephonic warrant arrived sometime after the truck had been stopped and the house "secured." Search was then made under the warrant and large quantities of marijuana were found in both truck and house. Defendant contended on trial that entries made under the guise of "securing the premises" were illegal and urged application of the exclusionary rule to deter such activity. On appeal, the question presented for review was whether the evidence should be suppressed that was seized from defendant's house pursuant to a warrant when, absent exigent circumstances, the police had entered and "secured" defendant's house prior to obtaining that warrant.

The Arizona Supreme Court, en banc, held as a matter of state law that officers may not make a warrantless entry of a home in the absence of exigent circumstances or other necessity. Such entries are "per se unlawful" under the state constitution because they are violations of the guarantee of the right to privacy. The court then went on to adopt the "independent source" doctrine approved by the U.S. Supreme Court in Segura v. United States, 104 S. Ct. 3380 (1984), in deciding whether to apply the exclusionary rule where a Fourth Amendment violation has occurred. The majority indicated that it could refuse to recognize the doctrine as a matter of state law; however, it chose to

recognize the doctrine because "one of the few things worse than a single exclusionary rule is two different exclusionary rules." Therefore, the majority held that the exclusionary rule to be applied as a matter of Arizona law is no broader than the federal rule. State v. Bolt, 689 P.2d 519 (1984), 21 CLB 379.

Washington Defendant was convicted of possession of heroin with intent to manufacture and deliver. A warrant directing a search for "controlled substances, including heroin" was signed by a Seattle judge. The investigating officers knew that the suspect's home was protected by two doors, a normal door on the inside and a wrought iron door containing grillwork with very small openings on the outside. They had also been informed that defendant usually answered the door, either in possession of a handgun or with a handgun within reach. For these reasons, the officers decided that unless they used a "ruse" to get defendant to unlock and open the wrought iron door, they might be unable to execute the search warrant. The officers therefore prepared a fictitious traffic arrest warrant signed by a fictitious judge. They showed defendant the fictitious warrant, and he said it was a mistake. The officers asked to enter the house to make a phone call to clear things up. Defendant opened the outside door and invited the officers in. As soon as the gate was open and before the officers entered the house, a detective advised defendant that he had a search warrant. Defendant then told the officers to enter. The subsequent search produced heroin, drug paraphernalia, and a large amount of cash. Defendant was then arrested. On appeal, defendant contended that the police officers' use of the fictitious arrest warrant violated his due process rights.

The Washington Supreme Court, en banc, stated that the guiding factor in determining whether a ruse entry to execute a search warrant constitutes a "breaking" under the Fourth Amendment should be whether the tactic frustrates the purpose of the "knock and announce" rule. That rule has three objectives: (1) to avoid violence to persons, (2) to prevent property damage, and (3) to protect the right of privacy of individuals. The employment of the ruse actually furthered the first two objectives, the court stated, and did not frustrate the third. Where the police have satisfied the warrant requirement, an individual's right of privacy, the court noted, has already been judicially curtailed. Since the officers had the right to enter the house irrespective of defendant's wishes, the court found the argument that his consent was uninformed and therefore invalid was unpersuasive. The court concluded that imposing an informed consent requirement on all police entries would come near to a rule declaring all undercover police activity unconstitutional per se. State v. Myers, 689 P.2d 38 (1984), 21 CLB 267.

§ 58.100 —Necessity of obtaining a warrant

U.S. Supreme Court When several police officers arrived at defendant's house in response to a report of a homicide, they found defendant lying unconscious in a bedroom due to an apparent drug overdose and defendant's wife dead of a gunshot wound. Shortly thereafter, two homicide investigators entered the residence and commenced a two-hour "general exploratory search." Defendant was subsequently indicted for second-degree murder and moved to suppress three items of evidence discovered during the search. The trial court suppressed two items of evidence found during the search, but the Louisiana Supreme Court held all the evidence to be admissible.

The Supreme Court reversed the decision of the Louisiana Supreme Court, holding that although police officers may make warrantless entries on premises where they reasonably believe that the person within is in need of immediate aid, there is no "murder scene exception" to the warrant requirement, and a warrantless search is not permissible simply because a homicide has recently occurred there. Thompson v. Louisiana, 105 S. Ct. 409 (1984), 21 CLB 255.

§ 58.105 Search incident to a valid arrest

§ 58.110 —Probable cause

U.S. Supreme Court U.S. Customs officers observed two pickup trucks on a remote private airstrip in Arizona and the arrival and departure of two small airplanes. After arresting defendants, the officers took the trucks back to the Drug

Enforcement Agency headquarters, and the packages were then placed in a Drug Enforcement Agency warehouse. Three days later, government agents, without obtaining a warrant, opened some of the packages and took samples that later proved to be marijuana. The district court granted defendants' motion to suppress the marijuana, and the court of appeals affirmed.

The Supreme Court reversed and remanded, holding that the warrantless search of the packages three days after they were removed from the trucks was proper, since the officers had probable cause to believe that not only the packages but also the trucks themselves contained contraband. The Court reasoned that the officers could have lawfully searched the packages when they were first discovered on the trucks at the airstrip, and there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. United States v. Johns, 105 S. Ct. 881 (1985), 21 CLB 370.

Arizona Defendant was convicted of unlawful transportation of marijuana, a felony, and was sentenced to a mitigated imprisonment term. Defendant appealed, and the court of appeals reversed, holding that the warrantless search of defendant's car, based in part on information from an informer, did not satisfy the requirements of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). These two cases controlled the constitutionality of a search conducted as a result of information obtained through an informant, until they were abandoned by the United States Supreme Court. The state supreme court concluded that the search could be upheld only if Illinois v. Gates, 103 S. Ct. 2317 (1983), and United States v. Ross, 455 U.S. 798 (1982), received retroactive application.

The Arizona Supreme Court found that the United States Supreme Court did not consider *Gates* and *Ross* to be a sharp break with the past; those cases receded from the strict application of *Aguilar* and *Spinelli* but did not wholly disregard the old standard. Instead, "the *Aguilar/Spinelli* test was incorporated into the *Gates* 'totality of circumstances' test . . ." and therefore the *Gates* and *Ross* cases could fairly be applied retroactively. Since one of the stated purposes of the exclusionary rule is to deter police misconduct by excluding material evidence of guilt, the courts have been reluctant to apply it retroactively because there is little deterrent effect in "punishing the constable" for violation of a rule that he did not know about at the time he seized the evidence. However, the court said, the situation is different when, as here, evidence previously excludable by operation of the exclusionary rule is now admissible because of the reversal of a previous rule excluding such evidence. State v. Espinosa-Gomez, 678 P.2d 1379 (1984), 21 CLB 189.

Colorado Defendant was arrested and thereafter charged with driving under the influence of intoxicating liquor. Defendant filed a motion to suppress all evidence obtained from him, including visual observations of the arresting officer, chemical testing, and a custodial statement to the police, on the ground that such evidence was the fruit of an unconstitutional search and seizure in violation of the Fourth Amendment as well as the Colorado Constitution.

The trial court ruled that the officer had reasonable suspicion to initially stop defendant for driving on the wrong side of the road and, as part of that stop, could properly order defendant to get out of his car. The court, however, held that officer's order to walk to the rear of the vehicle constituted an unlawful search unsupported by probable cause. Under derivative evidence principles, the trial court suppressed all the evidence specified in defendant's motion.

The Colorado Supreme Court granted certiorari and ruled that to satisfy constitutional guarantees against unlawful searches and seizures a roadside sobriety test can be administered only when there is probable cause to arrest the driver for driving under the influence of, or while his ability is impaired by, intoxicating liquor or other chemical substance, or when the driver voluntarily consents to perform the test. Since the people did not contend that there was probable cause here, the only basis relied upon by the officer in administering the roadside test was defendant's alleged consent. Because the issue of consent is essentially a factual question the

court said that the appropriate procedure was to remand the case to the trial court to resolve the consent issue. People v. Carlson, 677 P.2d 310 (1984), 21 CLB 83.

North Dakota Defendant was stopped for a speeding violation by a police officer who asked defendant to produce his drivers's license. Defendant got out of his car and opened the trunk and unzipped a suitcase from which he produced his license. The officer then ordered defendant to sit in the patrol car, and defendant complied. The officer testified that he recognized defendant as the individual he had seen stumbling off a sidewalk near a bar earlier that evening. While they were sitting in the car, the officer issued the speeding citation and observed that defendant's complexion was flushed, that his eyes were bloodshot, and that he had an odor of alcohol. Because of these observations, the officer administered field-sobriety tests which defendant failed. Thereupon, defendant was placed under arrest for driving while under the influence of alcohol (DUI). Thereafter, defendant was given a blood-alcohol test after the implied-consent advisory on the request and notice form had been read and explained to him. The breathalyzer test established a reading of .17 percent of alcohol in defendant's blood. On appeal, after conviction, defendant contended that the officer effected a custodial arrest without probable cause by ordering him into the patrol car and that the officer then conducted an illegal search of defendant's person in order to establish probable cause for DUI. Defendant further argued that all the state's evidence that was discovered after he was illegally seized should have been suppressed by the trial court.

The North Dakota Supreme Court affirmed his conviction and focused on whether or not the officer's order to defendant to sit in the patrol car was a reasonable seizure under the Fourth Amendment and therefore a reasonable invasion of defendant's personal security. The court concluded that this additional intrusion can only be described as de minimis, and what was a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's and driver's safety. Thus the court extended the reasoning of the U.S. Supreme Court in Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330 (1977), to this case. State v. Mertz, 362 N.W.2d 410 (1985), 21 CLB 471.

§ 58.120 —Manner of making arrest or entering premises as affecting validity of subsequent arrest or search

U.S. Supreme Court Following a car accident, a witness told the police that the driver might have been drunk. After checking the car's registration, the police, without obtaining a warrant, went to the owner's house at about 9 P.M. and arrested him for driving under the influence of an intoxicant in violation of Wisconsin state law. When his license was suspended, the Wisconsin Court of Appeals vacated the order on Fourth Amendment grounds, but the Wisconsin Supreme Court reversed and reinstated the order.

The Supreme Court vacated and remanded, holding that warrantless nighttime entry into an individual's home to arrest him for violation of a civil nonjailable traffic offense violates the Fourth Amendment. The Court explained that before government agents may invade the sanctity of the home, they must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. Welsh v. Wisconsin, 104 S. Ct. 2091 (1984), 21 CLB 70.

Court of Appeals, 5th Cir. After defendants pleaded guilty to marijuana conspiracy charges, they appealed on the ground that evidence obtained pursuant to a search warrant had been improperly admitted.

The Court of Appeals for the Fifth Circuit affirmed the convictions, holding that since the search warrant was based on sufficient probable cause even without evidence supplied by a Drug Enforcement Agent's illegal entry into defendant's house, the trial court's redaction of the search warrant and admission of the evidence obtained in the search was correct. The court observed that search warrants should be viewed in a realistic and commonsense manner, and that the search warrant here was based only in small part on the agent's observations. United States v. Antone, 753 F.2d 1301 (1985), 21 CLB 371.

§ 58.130 Investigative stops

U.S. Supreme Court Following an armed robbery in Ohio, a "wanted flier" was issued on the basis of information obtained from an informant about the driver of the getaway car. Subsequently, a police officer stopped the vehicle that defendant was driving based on information contained in the flier, and a passenger in the car was arrested when a gun was observed protruding from under the passenger seat. Defendant was also arrested and charged with a federal crime of being a convicted felon in possession of firearms after a search of the car uncovered more handguns. Defendant was convicted in the district court, but the court of appeals reversed, finding that the wanted flier was insufficient to create a reasonable suspicion that defendant had committed a crime.

The Supreme Court reversed, holding that a wanted flier issued on the basis of articulable facts supporting a reasonable suspicion that the person had committed an offense is a sufficient basis to support an investigatory stop. The Court reasoned that restraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee and remain at large. United States v. Hensley, 105 S. Ct. 675 (1985), 21 CLB 369.

U.S. Supreme Court While patrolling a highway for suspected drug trafficking, a state officer stopped an overloaded pickup truck and told the driver that he would be held until a DEA agent arrived. The DEA agent arrived about fifteen minutes later, and after seeing that the truck was overloaded and upon smelling marijuana, the agent searched the truck and found bales of marijuana. Defendant was tried and convicted on federal drug charges, but the court of appeals reversed.

The Supreme Court reversed and remanded, holding that the twenty-minute detention of defendant clearly met the Fourth Amendment's standard of reasonableness. The Court explained that the investigative stop was reasonable since the DEA agent had diligently pursued his investigation, and no delay unnecessary to the investigation was involved. The Court thus rejected the per se rule articulated by the court of appeals that a twenty-minute detention is too long for an investigative stop. United States v. Sharpe, 105 S. Ct. 1568 (1985), 21 CLB 464.

New York Defendant was convicted of operating a motor vehicle while impaired. Defendant, while driving at about 2:00 A.M. on Saturday, came up to a roadblock established pursuant to a directive from the county sheriff. An officer requested defendant to produce his license, registration, and insurance card. Observing that defendant fumbled for his wallet, had bloodshot eyes, and smelled of alcohol, the officer asked whether defendant had been drinking. After defendant responded that he had just left a bar, he was asked to step out of his car. As he did so he was unstable on his feet and was unable successfully to perform heel-to-toe and finger-to-nose tests. Based on those facts and an alcosensor breath screening test, which defendant agreed to take, the officer concluded that defendant was intoxicated and placed him under arrest. The roadblocks were conducted pursuant to a detailed memorandum outlining procedures for site selection, lighting and signs, avoidance of discrimination, location of screening areas, and the nature of inquiries to be made. The memorandum also directed that two to four checkpoint locations should be used during a four-hour period. Defendant's motion to suppress the evidence obtained at the roadblock was denied. On appeal, defendant argued that a temporary roadblock is constitutionally impermissible, and that it had not been shown that less intrusive means of enforcement would not be effective.

The court of appeals affirmed, finding that a roadblock was a sufficiently productive mechanism in relation to both its detection and deterrence effect to justify the minimal Fourth Amendment intrusion involved. These checkpoints met the constitutional requirement that they be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers as set forth in Brown v. Texas, 443 U.S. 47 (1979). The governmental interest here was found to sufficiently outweigh the intrusion on individual liberties to justify such limited stops. People v. Scott, 483 N.Y.S.2d 649 (1984), 21 CLB 375.

ELECTRONIC EAVESDROPPING

§ 58.160 Disclosure of conversations overheard

Rhode Island A private citizen reported to the Woonsocket police what appeared to be a man discussing the sale of drugs on her AM radio. The police department monitored its "standard every day AM radio" and recorded similar conversations from defendant's cordless telephone, which operates by means of radio waves. Defendant spoke into a hand-held mobile unit that converted his voice into radio waves and transmitted them to a basement in his home, which in turn transmitted his voice over standard telephone lines. Incoming callers' voices were transmitted through ordinary lines to defendant's base unit, which transmitted those voices to the hand-held unit by means of radio waves. These radio waves were picked up by the police department's AM radio. Defendant was arrested and charged with drug violations and having violated bail bond conditions set in pending cases. A bail revocation hearing was held, and the hearing justice found defendant to be in violation of his bail conditions and ordered him to be held without bail. On appeal, the question before the court was whether defendant's communications were protected "wire" or "oral" communications (i.e., communications that may not lawfully be "intercepted" without prior judicial authorization pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520).

The Rhode Island Supreme Court concluded that the police officers did not violate Title III when, acting without a court order, they tuned in a common AM radio to the telephone conversations unwittingly broadcast by defendant over his cordless telephone. Defendant's unintentional broadcasts were not "wire communications" within the purview of the eavesdropping statute, the court stated, emphasizing that the police in no way interfered with the telephone transmission lines. The court pointed out that listening to the calls over a standard radio was not the sort of governmental conduct that Title III was intended to guard against. To hold otherwise would require the police to seek a court order to listen to an ordinary radio, and perhaps more absurdly, the failure to obtain such an order could conceivably subject the police to both civil and criminal sanctions. State v. Delaurier, 488 A.2d 688 (1985), 21 CLB 475.

§ 58.165 Standing to challenge

U.S. Supreme Court After DEA agents learned that defendants had ordered a particular chemical from an informant, who had told agents that the chemical was to be used to extract cocaine from clothing imported into the United States, the government obtained a court order authorizing the installation and monitoring of a beeper in one of the chemical cans. The can was then moved to two other houses, a storage locker, and transported in a truck. Using the beeper monitor, agents determined that the "beeper" can was inside the house, and obtained a warrant to search the house based in part on information derived through use of the beeper. When the warrant was executed, cocaine was found and seized. The district court granted the defendant's motion to suppress the evidence, and the court of appeals affirmed.

The Supreme Court reversed, holding that no Fourth Amendment interest of defendants was infringed by the installation of the beeper, and the informant's consent was sufficient to validate the installation. The Court explained that although defendants had a privacy interest in their house, no privacy interest was invaded while the can was in the trunk. Thus, the warrant used to search the house was based on sufficient untainted information to furnish probable cause. United States v. Karo, 104 S. Ct. 3296 (1984), 21 CLB 68.

SUPPRESSION OF EVIDENCE IN GENERAL

§ 58.200 Standing

California Plainclothes officers observed defendant, who was then 16 years of age, approach several vehicles in a park in which drug sales were believed to be occurring. He appeared to transfer something between himself and the drivers of two of the vehicles. He removed something from his waistband and handed it to the occupant of a third vehicle receiving something in exchange. When defendant approached the officers' vehicle, one

officer asked him if he knew where to get some "smoke." Defendant, who appeared to be nervous, replied "no" and then walked to a pickup truck where he dropped a plastic baggie into the open window on the driver's side. The two officers walked to the truck, opened the door, and removed the baggie which was found to contain marijuana. The truck was occupied by two persons, neither of whom gave permission to open the baggie. Defendant was arrested. A search of his person revealed a second baggie of marijuana and $35. At the hearing on defendant's motion to suppress the physical evidence as products of a warrantless search undertaken without probable cause, the trial court concluded that the officers' observations of the exchange of baggies between defendant and the occupants of the vehicles did not establish probable cause for a search of the pickup truck, or for an arrest and search of defendant. Therefore, the court reasoned, suppression of the evidence was required unless Section 28(d), which was added to the California Constitution by Proposition 8-a, the 1982 voters' initiative, abrogated the rule under which defendant had standing to object to the unlawful search of the pickup truck. Concluding that Section 28(d) eliminated any independent state ground for suppression of the evidence, and that defendant lacked standing to object to a violation of the Fourth Amendment rignts of the occupants of the pickup truck, the trial court denied the motion to suppress.

The California Supreme Court, en banc, affirmed and found that under Section 28(d), as added to the state constitution, "relevant evidence shall not be excluded in any criminal proceeding . . ." except by statute enacted by a two-thirds vote of each house of the legislature. A majority of the court held that the amendment leaves intact Article I, Section 13 of the California Constitution, which had been construed to provide broader protection against search and seizure than the Fourth Amendment; however, courts in the state would no longer be able to exclude evidence on state grounds alone. The majority stated that the amendment's meaning was unambiguous in that it implicitly restricts the ability of state courts to create remedies for unlawful searches except to the extent that they also violate the federal constitution. This interpretation, the majority indicated, is clear from both the language of Section 28(d) and the ballot pamphlet explaining it to the voters. Thus, the court read out of existence the vicarious exclusionary rule, a judicially created remedy that had no federal counterpart. Thus, the court, after analyzing the leading search and seizure cases, concluded that invasion of a personal right of defendant is necessary to accord standing to invoke the Fourth Amendment exclusionary rule. *In re* Lance W., 694 P.2d 744 (1985), 21 CLB 473.

§ 58.210 Hearing procedure

U.S. Supreme Court After defendants were convicted in Georgia state court on gambling charges in violation of the RICO Act, they appealed on the ground that the pretrial suppression hearing had been improperly closed to the public. The prosecution alleged that the unnecessary "publication" of information obtained under the wiretaps would make them inadmissible as evidence, and that the wiretap evidence would involve the privacy interests of some persons who were not on trial. The trial court granted the state's request, and the Georgia Supreme Court affirmed.

The Supreme Court reversed and remanded, holding that the closure of the entire suppression hearing here was plainly unjustified since the state offered nothing specific on the issue of whose privacy interests might be infringed if the hearing were open to the public, what portions of the wiretap tapes might infringe those interests, and what portion of the evidence consisted on the tapes. Waller v. Georgia, 104 S. Ct. 2210 (1984), 21 CLB 73.

FRUITS OF THE POISONOUS TREE

§ 58.230 Evidence held admissible

U.S. Supreme Court Officers executed a search warrant based on informant information and surveillance information, finding large quantities of drugs and other evidence. The district court granted defendant's motion in part to suppress, concluding that the affidavit was insufficient to establish probable cause. The court of appeals affirmed.

The Supreme Court reversed, holding that the exclusionary rule should not bar the use of evidence at trial obtained by

officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid. United States v. Leon, 104 S. Ct. 3405 (1984), 21 CLB 77.

U.S. Supreme Court Defendant was convicted in Massachusetts state court of first-degree murder, but the Massachusetts Supreme Judicial Court reversed on the ground that evidence admitted at trial was based on an invalid warrant.

The Supreme Court reversed, holding that where police officers were advised by a judge that all necessary clerical changes had been made in a defective warrant form, there was a reasonable basis for the police officers' belief that the search based on the warrant was lawfully executed. Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), 21 CLB 77.

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of making false statements on a passport application, he appealed on the ground that evidence obtained during a search of his residence and his person conducted by the British police should have been excluded.

The Court of Appeals for the District of Columbia Circuit affirmed, holding that the exclusionary rule does not apply to foreign searches conducted by foreign officials unless there is some participation by American officials or officers. The court noted that U.S. courts cannot be expected to police law enforcement practices around the world, and that American authorities did not know about the first search of defendant's residence until after it had taken place. United States v. Mount, 757 F.2d 1315 (1985), 21 CLB 471.

§ 58.235 —Lack of "primary" taint

U.S. Supreme Court During a narcotics investigation, DEA agents arrested one defendant in the lobby of his apartment building, took him to the apartment, knocked on the door, and when it was opened by a second defendant, the agents entered the apartment without requesting or receiving permission. The agents then conducted a limited check of the apartment and observed various drug paraphernalia in plain view. A search warrant was not issued until some nineteen hours later, and in the meantime, the agents discovered cocaine and other evidence. The district court granted defendants' motion to suppress all the seized evidence, and the court of appeals held that only the evidence discovered in plain view seized after the initial entry was admissible.

The Supreme Court affirmed, holding that the exclusionary rule did not apply here since there was an independent source for the challenged evidence. The Court explained that the evidence was discovered during a search of the apartment pursuant to a valid search warrant, since the information on which the warrant was based came from sources wholly unconnected with the initial entry. Segura v. United States, 104 S. Ct. 3380 (1984), 21 CLB 78.

59. PROHIBITION AGAINST SELF-INCRIMINATION

TESTIMONY AND RECORDS

§ 59.30 Right to refuse examination by state psychiatrist

Court of Appeals, 2d Cir. After defendant was convicted in the district court on a five-count indictment for bank robbery and related offenses, he appealed on the ground that the prosecutor misused psychiatric material from a court-ordered interview of him.

The Court of Appeals for the Second Circuit affirmed, holding that the prosecutor remained within the bounds of a legitimate attempt to challenge the insanity defense and did not misuse material from a psychiatric examination. The court commented that while the prosecutor may have learned of the defendant's use of bad checks from the psychiatric examination, the information was only used on cross-examination to counter the defense theory that the defendant's writing of bad checks supported his insanity claim. The court, however, noted that it frowned on the practice whereby the prosecutor was either present at the psychiatric examination or heard a tape recording of it, although such was not a per se violation of the Fifth Amendment. United States v. Stockwell, 743 F.2d 123 (1984), 21 CLB 179.

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